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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 547

WALTER H. GANT, KNOX L. GARVIN, AND A. D. HUDSPETH, APPELLANTS,

vs.

THE CITY OF OKLAHOMA CITY AND J. W. VAN METER, SUPERINTENDENT OF BUILDINGS

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED DECEMBER 10, 1932

(37,244)

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IN DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

No. 65300

WALTER H. GANT, KNOX L. GARVIN, and A. D. HUDSPETH, Plaintiffs,

vs.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, a Municipal Corporation, and J. W. VAN METER, Defendants

Appeal from the District Court of Oklahoma County, State of Oklahoma

Hon. Sam. Hooker

Case-made—Filed Feb. 17, 1932; Filed in Supreme Court Feb. 18, 1932

[fol. 6] [Caption omitted]

[fol. 7] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

PETITION—Filed Oct. 2, 1930

Come now the plaintiffs and for their cause of action against the defendants allege and state:

(1) That the plaintiffs, Walter H. Gant and Knox L. Garvin, are the owners of a valid oil and gas mining lease covering the following described property situate in Oklahoma County, Oklahoma, to-wit:

Block nine, Meads Addition to Oklahoma City, Oklahoma; that said lease was executed on or about the — day of —— 1930, by —— —— and —— —— as lessors to A. D. Hudspeth as lessee and subsequently assigned by the said A. D. Hudspeth to these plaintiffs. These plaintiffs allege that said lease, among other things, provided that said lessee, or his assigns, should commence the drilling of a well upon said

premises for oil and/or gas within a certain time; and that the time within which said well was to be commenced has expired. That according to the terms of said lease it was incumbent upon these plaintiffs, as the assignee of the [fol. 8] lessee, to commence the drilling of said well within the time provided by said lease.

(2) These plaintiffs allege that in order to carry out the terms of said lease relative to the drilling of said well they did, on or about the — day of ——, 1930, enter into a contract with one M. T. Smith, a drilling contractor, to go upon said premises and drill thereon a well for oil and/or gas. That pursuant to said contract the said Smith proceeded to move machinery and equipment upon said premises and commence the drilling of said well and that said well is being drilled at this time and has reached an approximate depth of 2700 feet.

(3) These plaintiffs allege and state that before entering upon said premises by their said contractor for the purpose of drilling said well they complied with all the valid ordinances of the defendant city regulating the exploration of said premises for oil and/or gas and that they likewise complied with all valid rules, regulations and ordinances of said defendant city requisite to the procuring of a permit from said defendants for the drilling of said well upon said premises for oil and/or gas and that the Board of Adjustment of the defendant entered its order granting to said plaintiffs a permit to drill said well and that said order granting said permit has become final and is now in full force and effect.

(4) These plaintiffs further allege and state that said defendants are threatening to interfere with these plaintiffs and their said contractor in the drilling of said well by [fol. 9] wrongfully requiring these plaintiffs to execute and file with said defendants a bond in the penal sum of Two Hundred Thousand Dollars, signed by some surety company authorized to transact business within the State of Oklahoma, payable to said defendant city, conditioned as provided by a certain ordinance of said city; that said requirement of said bond is based on an oppressive, unreasonable, unconstitutional and void ordinance.

(5) These plaintiffs allege that the property upon which they are drilling said well is far removed from residences,

homes or buildings and that said property has been used for a period of more than twenty years as a city dump ground. That there are now wells drilled or being drilled in close proximity to said property which, when completed as producers of oil and/or gas, will drain these plaintiffs' property of the oil and/or gas underlying the same.

(6) Plaintiffs allege that they acquired their interest in said oil and gas mining lease long prior to the time that said defendant attempted to adopt such oppressive, unreasonable and void ordinance.

(7) Plaintiffs allege that the demand of said defendants for such bond is unreasonable and unconstitutional and if enforced will have the effect of depriving these plaintiffs of valuable property rights without due process of law. Said demand of said defendants for said bond is unreasonable, oppressive and unconstitutional in that it places the plaintiffs at the mercy of surety companies authorized to transact business within the State of Oklahoma; that such [fol. 10] surety companies, before they will execute such a bond for these plaintiffs as surety, have made and will make certain demands of these plaintiffs which plaintiffs are unable to meet and that because of plaintiffs' inability and failure to meet such demands said companies have and will refuse to become surety upon such bond for these plaintiffs and that by reason thereof these plaintiffs are and will be unable to comply with the demands of said defendants under said ordinance. That said provision of said purported ordinance in its practical operation, if enforced, is discriminatory, discriminating between these plaintiffs and those persons, firms or corporations more fortunately situated financially who are able to comply with the requirements of said surety companies relative to the execution of said surety bonds.

(8) These plaintiffs allege and state that they have now offered to make and file with said defendant city a bond conditioned as required by said void ordinance with good and sufficient personal sureties thereon, and here and now tender such a bond in a sum that is reasonable adequate to protect said city and all persons in close proximity to said well, but that said defendant has wrongfully refused to permit these plaintiffs to file such a bond.

(9) These plaintiffs further allege and state that said defendants have threatened and are threatening to interfere with these plaintiffs and plaintiffs' contractor in the drilling of said well and are threatening to forcibly stop the drilling thereof. And that said defendants, their offi- [fol. 11] cers, agents, servants and employes, unless restrained by the interposition of the protective authority of this court, will refuse to allow plaintiff and plaintiffs' contractor to proceed with the drilling of said well to the irreparable damage and injury of plaintiffs for which plaintiffs have no adequate legal remedy.

Wherefore plaintiffs pray for a temporary restraining order restraining said defendants, their officers, agents, employes, and servants from interfering with the plaintiffs and plaintiffs' contractor in the drilling of said well, and that this matter be heard, upon notice, and thereupon a temporary injunction be granted enjoining said defendants, their officers, servants, agents, employes and appointees from interfering with plaintiffs and their contractor in the drilling of said well and that upon a final hearing said temporary injunction be made permanent, and for such other and further relief to which they may be justly entitled.

Twyford & Smith, Womack, Brown & Cund, Attorneys for Plaintiffs.

[fols. 12-14] *Duly sworn to by Knox L. Garvin. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 15] In District Court of Oklahoma County

[Title omitted]

Answer and Cross-petition—Filed Oct. 7, 1930

Come now the defendants, the City of Oklahoma City, Oklahoma, and J. W. Van Meter, and for answer to the petition of plaintiffs filed herein, states:

1. That said petition fails to state facts sufficient to constitute a cause of action in favor of plaintiff and against these defendants.

2. That the petition shows on its face that the plaintiffs made application to the city, and were granted a permit to drill a well on the property set out in the petition of plaintiffs, conditioned that the plaintiffs comply with the [fol. 16] ordinances and execute a bond as provided by the ordinances of the City of Oklahoma City, and especially section 21 of Ordinance No. 3944, being an amendment to chapter 22 of the General Ordinances of 1928, and commonly known as the drilling provision of the zoning ordinance, and that the plaintiffs sought the benefits of said ordinances in so far as they might operate in favor of plaintiffs, and now seek to destroy the provision which they do not desire to comply with, and by reason thereof, the plaintiffs, and each of them, are estopped to maintain this action.

3. That the plaintiffs show by their petition that they have no- exhausted the adequate remedy at law provided by chapter 178 session laws of 1923, and chapter 22, revised ordinances 1928 of said city, and therefore, they are not entitled to maintain this action.

4. The defendants deny generally and specifically, each, every and all the material allegations in said petition contained.

Cross-petition

Come now the defendants, the city of Oklahoma City, and J. W. Van Meter, as superintendent of buildings for said city, and for their cross action against the plaintiffs, allege and state:

1. That the plaintiffs, Garvin and Gant, is a partnership composed of Knox L. Garvin and Walter H. Gant, the said Knox L. Garvin being a resident of Stephens County, Oklahoma, and the said Walter H. Gant being a resident of [fol. 17] Carter County, Oklahoma; and the plaintiff A. D. Hudspeth is a resident of Oklahoma City, Oklahoma.

2. That the defendant, the City of Oklahoma City, Oklahoma, is a municipal corporation existing under and by virtue of the laws of the State of Oklahoma under a charter duly adopted and approved, as provided by law.

3. That prior to the — day of ——, 1930, the plaintiffs made application to the building commissioner of the City

of Oklahoma City for a permit to drill an oil or gas well on Block 9, Meads Addition to the City of Oklahoma City, which said application was denied and from which the said plaintiffs appeal to the board of adjustment of said city, pursuant to Chapter 22, Oklahoma City General ordinances of 1928, and amendments thereto. That said appeal was heard, and on the 15th day of September, 1930, the Board of Adjustment, aforesaid, made an order granting to the plaintiffs the right to obtain a permit for the drilling of one oil and/or gas well on Block 9, Meads Addition, aforesaid, and in addition thereto made certain other orders in connection with said property and the drilling of said well, and in addition thereto ordered that the plaintiffs comply with all ordinances and regulations of said city and all terms of all ordinances then in force or thereafter put in force in said city relating to the drilling, operation and maintenance of a well upon said property for which said permit was granted, a copy of said order is hereto attached and made a part hereof, and marked "Exhibit A".

[fol. 18] That after the granting of said order the plaintiffs went upon said property without obtaining a permit and without complying with the ordinances of the city, as hereinafter set out, and did commence the active drilling, and is now engaged in the active drilling of said well, and the defendant, the city of Oklahoma City, is informed and believes and, therefore, charges that the plaintiffs have drilled said well to a depth in excess of — feet and are about to penetrate the oil or gas bearing horizon or sand, without having obtained a permit and without having complied with said ordinances of said city in relation to the drilling, operation and maintenance of said well in this:

That the plaintiffs have failed to obtain a permit from the building superintendent pursuant to the order of the Board of Adjustment;

That the plaintiffs have failed and neglected to execute a bond in the amount of Two Hundred Thousand Dollars ($200,000.00) conditioned that the plaintiffs will pay and discharge any liability imposed by law for damages on account of injury to property, either private or public, or bodily injury, including death, received or suffered by any person or persons, firm or corporation resulting from the drilling, operation or maintenance of said well or structures incident thereto.

Wherefore these defendants pray that the Court restrain the plaintiffs, and each of them, their servants, agents and employes, from drilling or continuing the drilling of said [fols. 19-26] well upon said property until the plaintiffs have complied with the ordinances of said city and obtained a permit and executed a bond, as required by said ordinances, and that upon final hearing the temporary order be made permanent, and that these defendants have such other, further and additional relief to which it may be entitled in the enforcement of said ordinances.

M. W. McKenzie, Municipal Counselor, Attorney for Plaintiff.

Duly sworn to by Walter C. Dean. Jurat omitted in printing.

[fol. 27] In District Court of Oklahoma County, State of Oklahoma

No. 65300

Walter H. Gant, Knox L. Garvin, and A. D. Hudspeth, Plaintiffs,

vs.

The City of Oklahoma City, Oklahoma, a Municipal Corporation, and J. W. Van Meter, Defendants

Statement of Evidence

Be it remembered that the above styled and numbered cause came duly and regularly on for hearing and trial on the 12th day of February, 1932, pursuant to assignment heretofore duly made, before trial judge Sam Hooker.

[fol. 28] James Lemen, called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Twyford:

Q. State your name to the Court, please.
[fol. 29] A. James Lemen.

Mr. Hull: May I ask what particular case we are taking this evidence in?

Mr. Cund: In 65,300. I thought we were to take all of the evidence in all of the blocks at once.

Mr. Hull: I understood the stipulation and I think it probably would be better procedure to take the evidence in one case and then at the conclusion of that case we will let our stipulation apply that the evidence taken in that case might apply in the next case.

(Argument off the record.)

The Court: Most of the evidence would be applicable in all of the cases anyway, wouldn't it?

Mr. Hull: I think the evidence would be applicable to all of them except as to the physical surroundings in each location.

Mr. Twyford: That would be all of the difference.

The Court: They are close enough together that it might be applicable even then, aren't they?

Mr. Hull: It would be as to two of them, your Honor, yes.

(Argument off the record.)

The Court: It occurs to me that the evidence would be so interwoven that it would be hard to say how much of the evidence in the first case would be applicable to the second case, and so on.

Counsel for Defendants: This is an equity case, your [fol. 30] Honor, and we know the Court can take the evidence and weigh it and apply the evidence. Say, for instance, we take the first case, and after the evidence is all in, we know your Honors can take the evidence in Case 65,300 and apply the evidence to case No. 65,301 in so far as it might be applicable. If it was a jury cause, it would be different.

The Court: It is your idea, then, to try the first case first and not refer to the physical surroundings of the wells involved in the second case at all?

Counsel for Defendants: Not until we get to that particular case and then we can agree that so far as the testimony in this case is applicable, that the Court may consider it

in the other cases, and then show the physical surroundings.

(Argument off the record.)

The Court: If you try them separately you would have to put the same witnesses back on.

Counsel for Defendants: They are separate lawsuits, your Honor.

Mr. Twyford: It is the same plaintiff——

The Court (interrupting): It is hard for us to decide that. If the large part of the evidence is applicable to all of the cases, the large volume of it, I think it would be better to try them altogether. If it is going to be necessary to introduce a lot of evidence in each case, then they ought to be tried separately as far as they can be, the way I look at it. I don't know and I can't tell.

Mr. Twyford: Our stipulation already is that we intro- [fol. 31] duce the evidence in the first case and it will be considered applicable to the three cases and a separate judgment rendered in each case, that is already our stipulation. Now, if they want to change that——

The Court (interrupting): The stipulation can be interpreted either way.

Mr. Twyford: I thought we could introduce the evidence and the Court could decide which applies.

The Court: If most of the evidence is applicable to each case, we had better hear the evidence altogether then.

Mr. Twyford: That is right. That is our stipulation.

Attorney for Plaintiff: Now, we had better make your stipulation plain.

Atty. for Defendants: We will not make a stipulation. We will abide by the Court's ruling.

Atty. for Plaintiff: All right.

By Atty. for Plaintiff:

Q. State your name, please.

A. James Lemen.

Q. Where do you live, Mr. Lemen?

A. Oklahoma City.

Q. What is your business?

A. Engineer.

Q. How long have you been following that business in Oklahoma City?

A. Five years.

Q. Are you acquainted with the premises involved in this suit being described as block nine in Meades Addition to [fol. 32] Oklahoma City?

A. Yes, sir.

Q. Have you visited that property?

A. Yes, sir.

Q. Have you visited—how long have you known that particular district, of your own personal knowledge, and when did you first see it?

A. I have seen it before, I have been over the territory, but I took special notice of it two days ago, last Saturday.

Q. What did you do there last Saturday?

A. I went there in company with Mr. McDaniels and measured the distance from the well to various surrounding buildings.

Q. Did you make a plat of your survey?

A. Yes, sir.

Q. Is this the plat that you made?

A. Yes, sir.

Q. Now, just go ahead and tell the Court what you did there and what surrounds this particular location in the way of business, habitations, or things of any kind or character.

A. Well, the location of the well is approximately 100 yards, perhaps—not more than that—less than a half mile from the nearest business building, that is some stores which I noted.

The Court: What is that again? It is what?

A. The well is just off of Reno Street, 160 feet, as I measured it, from Reno, and west on Reno Street are some small stores, the nearest to my knowledge—they are ap- [fol. 33] proximately one-half mile from the location of this well. The nearest houses are perhaps a hundred yards closer than that. The nearest buildings which I found were railroad buildings somewhere in the neighborhood of 300 yards from the well site.

By Atty. for Plaintiff:

Q. Now, just in order that the Court might better understand, take the plat and point out on the plat there just where this location is to the court.

A. It has been marked out in pencil. Here is the location here. This is Reno Street.

By the Court:

Q. Where is the location of the well?
A. Right there, that lot there.

By Atty. for Plaintiff:

Q. What lot is that on? Can you tell me?
A. On Lot 9.
Q. And what block?
A. I don't see a block. It is Meades Addition. I don't believe there is a block in there.
Q. Which direction is this?
A. North.
Q. All right. North of there what do you find?
A. Find a railroad track.
Q. How far is that railroad track north of this location?
A. 750 feet is my measurements to the nearest track. There are several tracks in there.
Q. Are there any businesses along this railroad track here, or is it just simply——
A. (Interrupting.) I measured due north of the well 750 [fol. 34] feet to the track. Then up in an easterly direction up the track perhaps a hundred yards there is a water tank and a tall wooden building built onto the water tank—I think it is a water tank. It has the appearance of being a water tank.
Q. What do they use it for?
A. I didn't go near enough to see it. I think it is a storage building or perhaps an office building of some sort in connection with the railroad yards which are still further east on this track.
Q. Where are the city limits with reference to this well?
A. I understand this is the section line of the city limits.
Q. Then this country west of this location——
A. (Interrupting.) That is east.
Q. All right.
A. That is the south side of the city limits.
Q. Where is the Canadian River with reference to this well? About how far from the well is it? I want the record to show.
A. About a half mile.

Q. And what direction is the river from the well?

A. South.

Q. Now, what lies between the well and the Canadian River?

A. Waste land there which has been used for dump grounds and now has several wells located there.

Q. Is there any business or dwelling in between the well and the right south?

A. Nothing within sight of the road.

[fol. 35] Q. Where is the road?

A. Here, Reno.

Q. Describe it so that he can get it in the record. Do you mean on Reno Avenue?

A. Standing on Reno Avenue and looking south you can see no buildings out over that west area.

Q. What is it occupied by, that west area?

A. It has been used as a dump ground. There is much refuse laying there and there is several wells there.

Q. How many wells did you notice in that section?

A. I didn't count them. There is one across the road perhaps 150 feet south of Reno, and there are several others, I presume two or three hundred yards apart, several, three or four anyway.

Q. Now, take it west from the well, the location of the well, what did you find?

A. Coming about almost to this other section line which is Byers Avenue, extending about one block or perhaps two blocks east of Byers Avenue, which is one half mile from the city limits, or approximately one-half mile west from the location of this well, there is a little district in which there are some small residences extending about a block from Byers which is one-half mile from the well.

Q. Then west it is a half mile from the well to the nearest habitations?

A. Approximately.

Q. Approximately a half mile?

[fol. 36] A. Yes.

Q. Then what did you find southwest?

A. There is some residence district immediately south, the residence district which I just mentioned.

Q. What is in between the well and these resident houses a half mile west that you speak of?

A. Waste lands, dump grounds.

Q. What dump ground is it?
A. I understand it belongs to the city.
Q. Does that cover considerable acreage in there?
A. Yes, sir.
Q. And what do you find on that dump ground. What is there there?
A. Aside from refuse there is oil well drilling operations.
Q. That would be west?
A. Yes, sir.

The Court: And south?
A. Yes.

Q. South and west. Coming in this direction, northwest, what does this line represent here?
A. A railroad track.
Q. It is being used?
A. Yes.
Q. How far is that railroad track northwest from the location of this well?
A. This line represents a fraction of that railroad.
Q. How far is it from the well?
[fol. 37] A. This particular track is 750 feet from the well and this is in the neighborhood of a hundred feet farther.
Q. About 850 feet or 300 yards?
A. Yes.
Q. What is this?
A. Railroad track.
Q. And is that the city dump ground?
A. Yes, and also it has been used for hog pens.
Q. Now, when we cross the railroad coming northwest here and coming back north of the railroad, what do you find?
A. Some houses.
Q. What is this open space in here? What does that represent? Is that the city dump grounds, or do you know?
A. I don't know. I didn't observe that particularly.
Q. You didn't observe what was north of the railroad track?
A. No, but it is mostly waste ground. Some distance north of the railroad track there are some houses represented by this platted district here, I presume.

Q. You don't know there are houses there or not?

A. Yes, there are houses but I didn't estimate the distance.

Q. But, that is something like a half mile away?

A. Yes.

Q. This line here, what does that represent?

A. The river bed.

Q. What river bed—the Canadian River bed?

A. Yes, the Canadian River.

Q. Is it dry now?

[fol. 38] A. Yes, sir.

Q. Then, within a radius of a quarter of a mile of that well, you say there are no businesses and nobody living within a radius of that distance?

A. Yes, sir.

Q. I say, you say there are none?

A. Yes, sir.

Q. And then that takes in within that same radius of a quarter of a mile of that well—how many wells did you observe—oil wells already producing and drilling or already drilled and drilling within that same radius of a quarter of a mile of that well? Did you take any——

A. (Interrupting.) I didn't count them but I am sure there were at least four or five.

Q. Now, just east of this well I believe you state is the city limits?

A. Yes, sir.

Q. How far east of the well?

A. About 100 feet.

Q. Immediately on east there how near is the nearest well?

A. I took no special notice of the nearest well.

Q. Well, is it an off-set?

A. I presume it is 100 to 150 or maybe 200 feet east of the section line.

Q. That would throw the nearest well east, then? Something like 200 feet from the well, from the location that they are drilling which is involved in this suit?

[fol. 39] A. Yes.

Q. Is that a producing well or is it drilling or what?

A. I don't know anything about it.

Q. Now, southeast of that out in the country across the city limits, did you notice another well?

A. Yes, sir.

Q. How far was that from this location, about how far?

A. Oh, I presume that would be somewhere around in the neighborhood of perhaps three or four hundred yards.

Q. Is it producing, or do you know?

A. I don't know.

Q. You don't know about that?

A. No.

Q. Referring again to this plat so that I can—I may want to introduce that in evidence later—what is this point here?

A. It represents the well in question.

Q. And what is it east of the well, immediately east?

A. That is Reno.

Q. And immediately south?

A. The section line.

Q. And south of the section line is the open country?

A. You have your directions wrong. South is Reno and the east is the section line.

Q. This open country between the railroad track marked on your plat, and Reno Avenue marked on your plat, is that inhabited or not?

A. No.

[fol. 40] Q. How far is it from the well to the railroad tracks by your measurement on the plat?

A. 750 feet.

Q. And from the well to Reno Avenue?

A. 160 feet.

Q. And from the well west to Meade No. 1 you have it marked?

A. This is Meade No. 1 (indicating).

Q. Well, to this point here.

A. That is just the title to the sheet.

Mr. Twyford: We want to introduce this as Plaintiffs' Exhibit No. 1.

Atty. for Defendants: May I ask the witness a question in connection with this exhibit, your Honor?

The Court: Yes, you may.

By Atty. for Defendants:

Q. Is this drawn to scale?

A. Very closely, approximately, yes, sir.

Q. I didn't ask you that. I asked you if that was drawn to scale. You are an engineer and you know what that means.

A. I used a scale in drawing it, but I didn't use a great deal of care in placing my lines exactly.

Q. Then this is not an absolutely correct representation?

A. It is correct within, I would judge, five or ten per cent of the distances.

Q. But, you will please answer my question by saying what it is. It is not a correct representation, is it?

A. No drawing is absolutely correct. No one could guarantee that a drawing was absolutely correct.

[fols. 41 & 42] Q. I beg your pardon?

A. No engineer could guarantee his drawing was absolutely correct according to scale.

Q. Well, now, I didn't ask you to guarantee anything, Mr. Witness. I asked you if that was a correct representation?

A. Yes, sir, it is.

Q. And drawn to scale?

A. Yes, sir.

Q. What scale did you use?

A. That scale is one-half inch equals 100 feet.

Q. One-half inch equals 100 feet?

A. Yes, sir, on that particular sheet.

Atty. for Defendants: All right.

(Which instrument so offered and received in evidence and having been heretofore marked "Plaintiffs' Exhibit No. 1" for the purpose of identification, is attached hereto in the form of a photostat copy.)

[fol. 43] By Mr. Twyford:

Q. Now, I call your attention to the location that you say is right north. What is that called—straight west a half mile, I mean. I get my directions wrong.

The Court: You have another plat there, now.

Mr. R. H. Brown: Yes, sir, this is one of the locations.

By Mr. Twyford:

Q. What s-it is this in, this well?

Mr. Cund: East Grand Avenue.

By Mr. Twyford:

Q. What suit is it involved in? Do you know?

Mr. Twyford: The other one is 65,300. Do you know which one this is?

Mr. R. H. Brown: Do you mean the legal description of the property?

Mr. Twyford: Yes. I want to know which suit this is involved in.

Mr. R. H. Brown: 65,301. This is the Grand Avenue, the East Grand Avenue Addition.

Mr. Twyford: All right.

The Court: Let the reporter mark it and then we will know what you are talking about.

(The plat is thereupon marked by the reporter "Plaintiffs' Exhibit No. 2", for the purpose of identification.)

By Mr. Twyford:

Q. Now, I will ask you to tell the Court what that plat represents, Plaintiffs' Exhibit No. 2.

A. It represents a plat of the district in which another one of the wells which I measured is.

Q. Well, on this map does it show?

A. Yes, sir.

[fol. 44] Q. All right. Point it out to the court. Point out where that location is.

A. The triangular district between two railroad tracks and Byers Avenue and running along this line.

Q. How far is this location from the location of the well you have just testified about?

A. Very little less than one-half mile.

Q. What direction?

A. West.

Q. Now, the present location, the one you are testifying about now, what would you find north from that well? What is the condition of the country there? Is the country there inhabited or otherwise?

A. A railroad track immediately north and just across the railroad track there is a plant operated by the Western Paving Company, cementing and cement mixing and asphalt mixing.

Q. How far would that be north of this well?

A. I figured it here. It is 250 feet to the railroad track. The Western Paving Company is immediately adjoining the track right-of-way.

Q. It would be about 100 yards north of this plant?

A. Yes.

Q. To this Western Union plant you are talking about?

A. Western Paving Plant, yes, sir.

Q. Now, what would be south?

A. Reno Avenue is south and along Reno Avenue are several small houses.

[fol. 45] Q. How far is it south?

A. Reno Avenue to the center of the street——

Q. (Interrupting.) From this well, I am talking about, how far is it to Reno Avenue?

A. To the center of Reno Avenue 224 feet.

Q. Now, these houses you speak about——

A. (Interrupting.) Are you on both sides of Reno Avenue.

Q. Are they inhabited?

A. Yes, sir.

Q. Then, you take that same—then you go back to the location and go west and what do you find there?

A. Due west, Byers Avenue.

Q. How far away is it?

A. 590 feet.

Q. What is between the well and Byers Avenue is this district in here?

A. It is vacant.

Q. What is it occupied by, if anything?

A. There is nothing there at all. It is waste land.

Q. Vacant land?

A. Yes.

Q. Do you know whether or not the well is located on a lease that is on all of this property in here?

A. Yes, sir.

Q. You say it is?

A. That is my understanding.

Mr. Hull: Do you know?

[fols. 46 & 47] The Witness: No, sir.

Q. Now, out west what do you find west of the well?

A. You find a point where the two railroad tracks merge——

Q. (Interrupting.) Well, is it occupied or not occupied out west? Is that open country?

A. In this triangular portion between the point where the two railroad tracks merge it is vacant.

By the Court:

Q. Did you say west?

A. East.

By Atty. for Plaintiff:

Q. Now, get your directions right. What is it?

A. Yes, sir, east.

Q. Is that a true representation as near as you could make it of the situation out there around that location, that plat?

A. Yes, sir.

Mr. Twyford: We offer that plat in evidence, if the Court please.

Mr. Hull: Let me ask a question.

By Mr. Hull:

Q. That is drawn to scale as the other one?

A. It is not the same scale. That scale, one inch equals 100 feet.

Q. That would be half the scale. The other one is a half inch to a hundred feet?

A. Yes.

Mr. Hull: All right.

(Which instrument so offered and received in evidence and heretofore marked "Plaintiffs' Exhibit No. 2", for the purpose of identification, is attached hereto in the form of a photostat copy.)

[fol. 48] By the Court:

Q. Do those two plats show they are adjacent to each other or that they overlap?

A. They show no reference to each other.

By Mr. Twyford:

Q. They do, as a matter of fact, do they not?

A. Referring to this plat you can see they are near to each other. Those sketches there on separate sheets show no reference to each other, however.

Q. Now, are there any oil wells drilling or producing near this location?

A. There is an oil rig north and east.

Q. Can you refer to this one here shown on this plat?

A. I presume that is it (indicating).

Q. Do you know how close that is to the Western Paving plant?

A. It is east of the Western Paving plant and a little bit north.

Q. How far east is the Western Paving plant?

A. How far east of the Western Paving plant?

Q. Yes. You said it was a little east.

A. Oh, a hundred yards I expect; not more than that.

Q. Is it as near the paving plant or nearer than the location in question here?

A. I believe that it is nearer.

Q. Is it near the Western Paving—do you know whether or not it is on the property of the Western Paving Company?

A. I have heard it said several times.

Q. But, you don't know about that?

A. No.

[fol. 49] Q. Is there any well in close proximity to this location that you know of?

A. That was the nearest one.

Q. Are there any other wells down in here?

A. Yes, I believe there are some across Reno Avenue and south of Reno Avenue and somewhat east of the location there.

Q. You spoke of some resident houses being along here on Reno Avenue?

A. Yes, sir.

Q. Now, are there any wells drilling or producing in this vicinity down in here on Reno Avenue near these buildings you speak of?

A. In this district in here I believe there are some wells producing.

Q. How near would they be to these resident houses you are talking about?

A. I didn't measure those distances.

Q. From your observation would you say there are wells drilling or producing or both, as near to these dwelling houses in here as this location in question is to them?

A. Yes, sir.
Q. You would say there were?
A. Yes.
Q. Now, I direct your attention to this plat here and ask you to tell the court what that is.

The Court: Is that marked?
Mr. Twyford: No, but I will have it marked as soon as he [fol. 50] tells what it is.

A. A plat of one block in Eckroats Addition to Oklahoma City, in which there is a well being drilled.

Mr. Twyford: Mark it.

(The instrument is thereupon marked by the reporter "Plaintiffs' Exhibit No. 3," for the purpose of identification.)

Mr. Twyford: Now, this is involved in what suit?
Mr. Hull: 65,302.
The Court: This is located at a different place altogether, is it?
Mr. Twyford: Yes, sir.

By Mr. Twyford:

Q. Can you point out to the court on this plat where this would be located? Is this the location?
A. Yes, this is the location.
Q. Tell what it is.
A. Well, I looked at it on the plat at one time and it is the southeast quarter of section ten, township eleven, range three west, block fifteen, Eckroats Addition to Oklahoma City.
Q. Now, then, whereabouts on this plat is the well?
A. It is represented by that large dot there.
Q. Which is north and what direction is this?
A. North.
Q. Is that setting right now?
A. Yes, sir.
Q. What block is this, please, sir?
A. Block 15.
[fol. 51] Q. Now, are there any habitations in block 15?
A. Yes, sir.
Q. Where are they?

A. A row of houses along this side of the block, represented here.

Q. Are there any habitations on the north half of the block?

A. No, sir.

Q. What size is the block?

A. 300 feet by 375 feet.

Q. What street is along the north side of this block?

A. 21st Street South.

Q. And north of that in the next block north across the street what do you find there? Is it occupied or not?

A. No houses on that side of the street except at this corner of the block represented by that square.

Q. Now, how far would it be, then, from the location to the house represented by this square in the block north? About how far?

A. This scale here—I will scale it. About 250 feet.

Q. All right. Now, then, going west from that location—this is what direction here?

A. West.

Q. Going west from that location, where do you find the nearest house?

A. On the west side of Stiles Street.

Q. And how far would that be from the location?

A. About 300 feet to that one.

[fol. 52] Q. And the next one?

A. 325 feet.

Q. Now, going east from this location, how far is it from the location to the nearest house northeast?

A. From 225 feet to 250 feet.

Q. And southeast, how far would you say it is?

A. About 275 feet.

Q. Now, this row of houses that you indicate on the plat on the south side of the block, how far are they away from this location? About how far would that be?

A. The nearest house, 130 feet.

Q. That is the nearest house there is to the location?

A. Yes, sir.

Q. In that same block what does this indicate down here, 120 feet away, I believe?

A. A store building. I believe a grocery store.

Q. A grocery store. Now, are there any well- in this immediate vicinity being drilled at this time or producing? Did you observe that?

A. Not within two or three blocks.

Q. There are wells within two or three blocks?

A. I could see the rigs over the tops of the houses. I didn't take particular notice.

Q. Are those wells, you say, drilling as near to dwellings as these are here, this location?

A. I wasn't near enough to those wells to see.

Mr. Twyford: We offer this plat in evidence.

[fols. 53 & 54] By Mr. Hull:

Q. That is drawn to scale, is it?

A. One inch equals 100 feet, yes, sir.

Mr. Hull: That is all.

Mr. Twyford: You may take the witness.

(Which instrument so offered and received in evidence, having been heretofore marked by the reporter "Plaintiffs' Exhibit No. 3", for the purpose of identification, is attached hereto in the form of a photostat copy.)

[fol. 55] Mr. Hull: For the purpose of the record we move to strike all of the testimony of this witness relative to the location of the various residences around these three particular locations, from the record, for the reason that it is incompetent, irrelevant and immaterial and it doesn't tend to support any attack on the requirement of the bond in the ordinance at all.

The Court: Overruled.

Mr. Hull: Exception.

Cross-examination.

By Mr. Hull:

Q. Mr. Lemen, you say you made a survey of the property around these three locations, and you have testified as to the situation for distances running from a block to a half a mile. On this Meades Addition, block 9, the first well you testified about, how far is that from the City Hall, the City Hall being at the corner of Grand Avenue and Broad-

way. Approximately how far is that? I know you didn't measure it, but approximately how far is it from the City Hall?

A. I could calculate with a few moments thought, but I haven't ever given it that consideration before.

Q. It is about a mile, isn't it?

A. I presume it is all of a mile.

Q. Not much more than a mile. I am talking about an air line and not going around the section lines.

A. Yes, I presume it is all of a mile.

Q. About a mile. And, of course, between the City Hall and Reno Street it is built up solid and business houses and factories and wholesale houses of various kinds are there? [fol. 56] A. Yes, sir.

Q. And north of the City Hall for a distance of, say, more than a mile, that is probably the most valuable business property in the city?

A. Yes, sir.

Q. Now, west of this first well you speak of, for a distance of a mile and a half, say, what would you say as to the settlement in there?

A. West of the City Hall?

Q. West of the block 9 location. In other words you stopped at the half mile line here. What is there on west here down Reno Avenue coming in toward Broadway for several——

A. (Interrupting.) For a distance of a mile and a half?

Q. Yes, sir. That gets more thickly built up as you come in closer to Broadway, doesn't it?

A. Yes, sir.

Q. And there are a great many residences in there?

A. Yes, sir. For a mile, I would say, there are more warehouses and buildings of that character.

Q. Yes, sir, business places?

A. Yes, sir.

Q. Are those frame buildings or are they brick buildings?

A. Pretty fair share of both.

Q. Good share of both classes of buildings?

A. Yes, sir.

Q. Now, going south from that well for a distance of a mile, what is built up south of the Canadian River there? [fol. 57] Is that section through here built up?

A. I am not familiar with that.

Q. You are not familiar with that?

A. No.

Q. You couldn't testify as to that?

A. No.

Q. Now, going south you were limited as to the settlement between the location and the Canadian River?

A. Yes, sir.

Q. Now, you know northwest of this well in block 9 of Meades Addition, there is considerable natural draw there that the city has one of its stone sewers down, do you not?

A. Yes, sir.

Q. How far is that north of that location or northwest, that draw?

A. I suppose between a quarter and a half mile.

Q. You don't know, or do you know whether the wells that are drilling in that immediate neighborhood that are inside of the corporate limits and that have posted this bond—do you know whether they have posted this bond before they went to work or not?

A. I know nothing about that.

Q. Do you know who is drilling them?

A. The ones we have been talking about?

Q. No, the surrounding wells?

A. No.

Q. You don't know who is drilling them?

[fol. 58] A. No.

Q. On the location of the Reinhart and the Donovan tract, that is a half mile west?

A. Yes, sir.

Q. The same testimony you gave as to the improvements lying between that well for a mile north, that would bring it up to Grand Avenue and Broadway, a mile, would it?

A. I don't think it would be a mile.

Q. It would be less than a mile?

A. Yes, sir, considerably less.

Q. And the same testimony that you gave as to the improvements lying between the Meade well and Grand Avenue and Broadway, would, of course, be applicable to this well?

A. I could be more specific and say that I believe between Broadway and the Santa Fe tracks the buildings

have a fairly permanent character. East of the Santa Fe tracks the buildings are of a ramshackle nature, in general.

Q. It is a matter of common knowledge, of course, that those improvements lying between either of these wells and the City Hall, say, or for a half mile still farther north of the City Hall, are worth many hundreds of thousands of dollars?

A. Undoubtedly.

Q. Undoubtedly?

A. Yes.

Q. Now, going west of the Reinhart and Donovan wells for a distance of a mile or a mile and a half, what do you find there?

A. Find a built-up district, mostly a warehouse district, [fol. 59] industrial district for the first half mile, perhaps. That would take you about to Broadway.

Q. About to Broadway, and that would be about a half mile?

A. Yes, sir.

Q. And from Broadway on west it is still built up in a wholesale district and a great many frame residences in there?

A. Yes, sir.

Q. Now, on the Eckroat well, the well in block 15 of—well, the Eckroat well down here in block 15, that is in the middle of a built up residential district, is it not?

A. Yes, sir.

Q. For a distance of a mile in any direction except, possibly, that is a pretty solidly built up residential district?

A. Yes, sir. Not so solidly north, perhaps, as it is in other directions immediately surrounding it.

Q. And that is mostly the frame bungalow type of construction, is it?

A. Yes, sir.

Q. And people live in there?

A. Yes, sir.

Q. Do you know, of your own knowledge, or from any report, how much territory was covered with oil when the Sigmon well went wild?

A. The Sigmon well?

Q. Yes, sir, the Sigmon No. 1 I think it was.

A. No, sir.

Q. You know that it covered an area of approximately [fol. 60] two square miles of territory with oil?

A. No, sir.

Q. Do you know that the Mary Sudik well covered approximately that same area when it went wild?

A. I heard that.

Q. Approximately two square miles?

A. I heard various things.

Q. If the Mary Sudik had come in on block 9 Meads Addition and had gotten out of control, it would have covered all of this city with oil up to a mile north of the City Hall, is that not correct?

A. Are you speaking of the Eckroat well?

Q. I am speaking of the Mary Sudik well, if it were located on block 9, Meads Addition and covered two square miles with oil, it would be possible that it would have covered all of this city with oil for a distance from a half to a mile north of the City Hall on Grand and Broadway, would it not?

A. Not if it covered two square miles, I wouldn't say so.

Q. How far would it have come up if it had been located on block 9 of Meades?

A. Two square miles would be less than two miles square and I would judge it would be more than two miles from there to the City Hall.

Q. I am talking about block 9 Meades Addition which you say is about a mile from the City Hall, approximately?

A. Assuming on the Meades location that a well would spray oil over an area of approximately two square miles, [fol. 61] and if the well was located in the center of that area, I presume it would cover almost to the City Hall.

Q. Yes, sir, and would cover almost all of this downtown district anyway. Now, the Santa Fe depot, passenger station and freight station, lies generally between the City Hall and Block 9 of Meades Addition, does it not?

A. Yes, sir.

Q. And also the Rinhard and Donovan Well?

A. Yes, sir.

Q. And the station of the M-K-T and the Union Bus station is all down in that same territory, is it not?

A. Yes, sir.

Q. Do you know the direction of the prev-iling winds in this country?

A. South, from the south; also somewhat from the east.

Q. The prevailing winds are from the south and east?

A. Yes, sir.

Q. And both of these locations, the Reinhart and Donovan and Block 9 of Meades, are southeast of the main business portion of this city, and the Eckroat location is more or less directly south, is that correct?

A. Yes, sir.

Mr. Hull: I believe that is all.

Redirect examination.

By Mr. Twyford:

Q. Now, he asked you about this Mary Sudik Well. Do you know how many wells have been drilled in that vicinity that haven't given any trouble?

[fol. 62] Mr. Hull: That is objected to as incompetent, irrelevant and immaterial. It is the unexpected that happens and that we have to guard against. How many wells they have brought in safely doesn't cut any figure.

The Court: Overruled.

Mr. Hull: Exception.

By Mr. Twyford:

Q. How many wells out in that country have been brought in that nothing has happened, approximately, in your judgment?

A. I have heard of at least, I suppose, ten or twenty—between ten and twenty.

Q. Where is that that you have mentioned?

A. In the south Oklahoma City field. I know very little about the oil operations in the South Oklahoma City field except what I read.

Q. There is possibly in this district here immediately southeast of Oklahoma City and around these two wells that he is asking you about, there are two or three hundred wells down in there, are there not, or more than that?

Mr. Hull: We object to that. The witness says he doesn't know.

Mr. Twyford: I am talking about the particular locality.

The Court: Well, he says he doesn't know. Prove that by somebody else.

Mr. Twyford: All right. That is all.

Mr. Hull: That is all.

(Witness excused.)

[fol. 63] THOMAS C. VAUGHN, called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cund:

Q. State your name, please, sir.

A. Thomas C. Vaughn.

Q. Where do you live, Mr. Vaughn?

A. Oklahoma City.

Q. What is your business?

A. Deputy conservation officer of the Corporation Commission of the State of Oklahoma.

Q. Are you familiar with the oil field in Oklahoma known as the Oklahoma City field?

A. Yes, sir.

Q. Do you know how many wells have been drilled in what is known as the Oklahoma City field, for oil and gas?

Mr. Hull: We object to that unless he confines his answer to the number of wells within the corporate limits. I don't think the number of wells outside that, which is known as the Oklahoma City field, is material.

The Court: Overruled.

Mr. Hull: Exception.

A. There have been 574 completions in the Oklahoma City pool proper.

Q. What does the Oklahoma City pool proper include, Mr. Vaughn? What territory does that cover?

A. Well, from section 35-11-3 west to the strip of country approximately six and a half miles north.

[fol. 64] Q. How many wells did you say had been completed in that district?

A. Five hundred and seventy-four to date.

Q. Do you know how many of that number have been drilled within the city limits of Oklahoma City?

A. There have been 21 completions, in the corporate limits?

Q. Twenty-one completions in the corporate limits?

A. Yes.

Q. And the remainder of the wells were in the outlying district surrounding Oklahoma City?

A. Yes, sir.

Q. Do you know how many of those completed wells that have been drilled, in the drilling thereof got beyond the control of the drillers and the contractors?

A. Twelve.

Q. Twelve?

A. Yes.

Q. The remaining number of completed wells have been drilled and completed without the wells getting beyond the control of the drillers and contractors?

A. Yes, sir.

Q. Are you familiar with the equipment and appliances that are used by drilling contractors in the drilling of oil and gas wells?

A. Yes, sir.

Q. Is there any equipment now in use generally in the Oklahoma City field that will prevent blow-outs and will [fol. 65] prevent wells from getting away?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial. There is no allegation in the petition that there is no hazard of drilling wells, and, as a matter of fact, they tender a bond for protection against hazard.

The Court: Sustained.

Mr. Cund: Exception. That is all with this witness.

Cross-examination.

By Mr. Hull:

Q. Mr. Vaughn, among these twelve wells that you speak of as having gotten out of control was the Sigmon No. 1?

A. That was included in the twelve.

Q. And the Mary Sudik well?

A. Yes, sir.

Q. And what was the name of the gas well that caught afire and burned for some time?

A. There were two, the Stamper No. 3 and the Kinter No. 5.

Q. The Stamper No. 3 and the Kinter No. 5?

A. Yes, sir.

Q. Do you know, of your own knowledge, how the territory was sprayed with oil when the Mary Sudik was out of control?

A. I never measured it. On one particular day when the wind was from the north, the oil went quite a distance south.

Q. A matter of a couple of miles from the well, would you say, Mr. Vaughn?

A. Yes, sir, I should say so.

Q. And, on the Sigmon well when it was out of control, [fol. 66] during that time the wind shifted, did it not, and not only sprayed to the north or the northwest, but the wind shifted and it sprayed to the southwest, did it not?

A. Yes, sir.

Q. For a matter of even farther than the Mary Sudik had?

A. I couldn't say as to the distance, but quite a ways.

Q. You would say a matter of a mile or more, in your best judgment?

A. Yes, sir.

Mr. Hull: That is all, Mr. Vaughn.

Redirect examination.

By Mr. Cund:

Q. Do you know, Mr. Vaughn, since the completion of the Mary Sudik and the Sigmon wells, since they went wild, whether or not there has been any equipment perfected that would have prevented that if they had been used on those wells?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial. That is the very reason we are attempting to require this bond, so that if there is such equipment the operator, in view of this bond being up to pay damages, will be more careful to use this equipment. It doesn't go to the validity of the bond at all.

Mr. Cund: I think it would be competent.

The Court: It is the same as the objection a while ago. Sustained.

Mr. Twyford: It wasn't on that theory, I don't believe, your Honor. They brought this Sigmon well in themselves out in the country and we want to show how it went wild. It is an explanation of that. These wells are only a hun-
[fol. 67] dred feet farther out. In explanation to their evidence I think it is competent to show what was wrong with those two wells.

(Argument off the record.)

The Court: Do you mean that new equipment invented since that time?

Mr. Twyford: And used, yes.

The Court: Mr. Witness, in your answer do you mean that they have invented new equipment?

Mr. Twyford: Discovered new equipment.

The Witness: I wouldn't say invented, but I would say they have perfected equipment since that time, yes, I would say they had.

The Court: Let him answer.

The Court: That doesn't protect against negligence on the part of the operator.

Mr. Cund: What was your answer?

The Witness: State that question again.

(The question is thereupon read by the reporter.)

A. Well, in the case of the Mary Sudik, at that time there were gates that would have held the well had they had them on, but they didn't have them on, and since that time I suppose that prompted the Commission to make the order to require the operators to have a gate on at the final setting of each string. The blow-out preventers were new, practically new at the beginning of the Oklahoma City pool, and they have been perfected from time to time and are very much more effective now than they were.

[fol. 68] By Mr. Cund:

Q. Would the use of a blow-out preventer now in a well drilled in that sand out there, prevent the well from getting away and getting out?

A. If it was in working order, yes, sir.

Q. Mr. Vaughn, do you know where Block 9 in Meads Addition to the City of Oklahoma City is located?

A. Not offhand, no, sir.

Mr. Twyford: Locate it by a different description.

By Mr. Cund:

Q. Here it is right here. (indicating on plat) Would you consider, from your experience, that the drilling of a well on Block 9 Meads Addition to Oklahoma City, Oklahoma, would be dangerous to the health, safety and public welfare?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial and calling for a conclusion of the witness on a non-expert matter.

The Court: Sustained.

Mr. Cund: Exception.

Mr. Twyford: I believe the court——

The Court (interrupting): That is a general question.

Mr. Twyford: This man poses as an expert and he has observed the drilling of lots of wells in this field and he is a conservation officer, and I think it would be enlightening to the court for him to give his opinion.

The Court: The question takes in too much territory. You are asking about the public health and safety and so forth.

By Mr. Cund:

Q. Mr. Vaughn, do you consider the drilling of an oil [fol. 69] and gas well in block 9 Meads Addition to Oklahoma City, where modern equipment is used in the drilling of the well, do you consider that it would necessarily endanger the public or private properties surrounding it?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial and it doesn't go to the validity of a requirement requiring a bond to protect against wells that are not properly operated.

The Court: Well, it goes to show the hazard. I suppose it has something to do with it. Objection overruled.

Mr. Hull: Exception.

A. I would think drilling a well up there would be more hazardous in this way: If some little thing would happen it would cause some damage, but with the proper equipment kept in proper order, there shouldn't be anything happen that they couldn't handle and the well shouldn't get away at all.

By Mr. Cund:

Q. Would your answer to that question be the same as applied to a well on block 15 Eckroat Addition, lots 3 and 4 in the East Grand Addition to Oklahoma City?

A. Yes, sir.

Mr. Cund: That is all.

Recross-examination.

By Mr. Hull:

Q. Mr. Vaughn, in your last answer you gave you meant to say that if they used all of the best known equipment, and every man connected with the operation of the well used all of his skill and wisdom, and if there was no negligence there at all, then, in your judgment, they could bring [fol. 70] a well in in this field without it getting away from them?

A. Certainly, yes, sir.

Q. But, so long as you have the human element to deal with and the negligence of employes which might occur, you can't say, as a matter of certainty, that none of them will ever get away, can you?

A. No.

Q. And you wouldn't attempt to say that, of course?

A. No.

By the Court:

Q. Let me ask this question: Is that very expensive equipment, this new equipment you speak of, or not?

A. Well, the—no, I wouldn't say that it is very expensive. There are different types. Probably some are as effective as others. There are three or four good types of blow-out preventers that cost from, well, $400.00 to $1,800.00 or $2,000.00, installed on a well. Most of the

operators are using the more expensive blow-out preventers.

The Court: Go ahead.

By Mr. Hull:

Q. Mr. Vaughn, continuing along the line of questioning just now, if a well got away in block 9 of Meads Addition, or block 15 of Eckroat's Addition, or the other location a half a mile west of block 9 Meads, because of its proximity to the business district of the city it necessarily would be a greater hazard and would create more injury than it would were it down at the extreme south end of what is spoken of as the Oklahoma City field, beyond the city limits, is that so?

[fol. 71] A. Naturally it would.

Mr. Hull: That is all.

Redirect examination.

By Mr. Cund:

Q. Are most of the operators and drillers in the Oklahoma City field, using the blow-out preventers when they bring wells in now?

A. That is compulsory.

Q. That is compulsory?

A. Yes, sir.

Mr. Cund: That is all.

Mr. Hull: That is all.

(Witness excused.)

Charles K. Scruggs, being called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cund:

Q. State your name to the court, please, sir.

A. Charles K. Scruggs.

Q. Where do you live, Mr. Scruggs?

A. Oklahoma City.

Q. What is your business?

A. Insurance and bonds.

Q. What bonding companies do you represent in this state?

A. The Detroit Fidelity & Surety Company, and the Metropolitan Casualty Insurance Company.

Q. Are those bonding companies authorized to transact [fol. 72] business within the State of Oklahoma?

A. Yes, sir.

Q. Mr. Scruggs, are you familiar with the kind of a bond required by the city of people drilling oil and gas wells within the corporate limits of Oklahoma City, a $200,000.00 bond?

A. I know what kind of a bond it is. I have never read it through thoroughly. I have never read the ordinance thoroughly.

Q. Your two companies are authorized in the State of Oklahoma to execute such a bond if they care to execute it, are they not?

A. Yes, sir.

Q. Before a bond like that for an independent contractor or for an individual desiring to drill a well within the corporate limits of Oklahoma City for oil and gas mining purposes is issued, what, in the way of indemnity from the person applying for the bond to the company, would your company require?

Mr. Hull: Objected to as incompetent, irrelevant and immaterial, the matter of the reasonableness of the bond requirement not being a matter of judicial inquiry.

The Court: Overruled.

Mr. Hull: Exception.

The Witness: Read that question.

(The question is thereupon read by the reporter.)

A. Well, they would require either cash or collateral to the full amount of the bond, or they would require them to show a financial statement of such an extent that they could very easily take care of the $200,000.00 damages.

By Mr. Cund:

Q. They would either require first that the person ap-
[fol. 73] plying for the bond put up securities readily convertible into cash for the full amount of the bond——

A. (Interrupting.) Absolutely convertible into cash.

Q. Absolutely convertible into cash immediately?

A. Yes.

Q. Or they would require that individual to make a financial statement showing a net worth which, in the judgment of the company, would protect them in the execution of the bond?

A. Yes, sir.

Q. Now, then, approximately what would that financial statement have to show the net worth of the person applying for the bond to be?

Mr. Hull: The same objection, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Hull: Exception.

A. Well, it would have to be, in my estimation, just from experience, it would have to show a net worth of over $1,000,000.00.

Q. A net worth of over a million dollars?

A. Yes, sir.

Mr. Hull: Now, we move to strike the answer of the witness for the reason that he is not shown to be qualified as a representative of his company in that capacity. He said from his experience and not from what his company would require.

The Court: Overruled.

Atty. for Defendant: Exception.

[fol. 74] By Mr. Cund:

Q. You do have authority to write bonds for the two companies you represent, do you not?

A. Yes, sir.

Q. What is the policy of the surety companies authorized to do business in this state, or what is the policy of your two surety companies authorized to write such bonds, relative to making bonds for individuals?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial and not within the issues in the pleadings.
The Court: Overruled.
Mr. Hull: Exception.

A. Do you mean this kind of a bond?

By Mr. Cund:

Q. Yes, sir.
A. Well, almost all companies have the same requirements, all good companies, that is, have the same requirements. They are all practically the same. They require the same things on the same class of bond.
Q. Do the companies writing bonds, in the actual operation of the writing of the bond, make a difference between individuals applying for bonds and the major oil companies doing business in this state? Is that their policy to do that?

Mr. Hull: Same objection.
The Court: Overruled.
Mr. Hull: Exception.

A. Well, it all depends on the financial statement. If an individual can furnish a financial statement to justify the bond, they would write it for him, but if they can't they will [fol. 75] decline the bond.

By Mr. Cund:

Q. Is that customary with all of the surety companies authorized to do business in this state?
A. All that I have ever heard of, or know about, practically all of them.
Q. The surety companies writing such bonds as that in this state, reserve the absolute right themselves to say whether or not they will execute such a bond as surety, do they?
A. Yes, sir.

Mr. Hull: We object to that as incompetent, irrelevant and immaterial and the witness is not qualified to answer.
The Court: Overruled.
Mr. Hull: Exception.
Mr. Cund: That is all.

Cross-examination.

By Mr. Hull:

Q. Mr. Scruggs, it doesn't make any difference to your company whether it is an individual or an independent operator or whether it is what Mr. Cund speaks of as one of the major companies, but you require the same requirements from any of them, either a satisfactory financial statement or cash or collateral equivalent?

A. Yes, sir.

Q. Because a man is an individual operator or an individual, you don't make the requirement any harder than you do on anybody else?

A. No.

Q. It is the same?

[fol. 76] A. Yes.

Q. Do you pass on the sufficiency of the financial statements that are made for the ordinary applicants to your company for bonds?

A. Do you mean on all of them or this class of bonds?

Q. On this class of bonds.

A. I do not pass on them on this class of bonds, but I do on other bonds.

Q. That goes to your home office, I assume, and it is passed on there?

A. Yes, sir.

Q. Have your home offices promulgated any rules in that respect? Have they got a fixed, definite policy as to what would be a sufficient statement and what would not be?

A. I imagine they have.

Q. But, you don't know of them if they have?

A. I know that——

Q. (Interrupting.) You are not personally advised as to what those rules and regulations are?

A. I know the rules and regulations are such that, as I stated, they would have to either put up the collateral or have a financial statement to justify it.

Q. Yes, sir, but what your companies consider a sufficient financial statement, you don't know what that is based on and that is a matter that is handled entirely by your home office?

A. Yes, sir.

Mr. Hull: I think that is all.

[fol. 77] Redirect examination.

By Mr. Cund:

Q. I believe you stated to Mr. Hull that it didn't make any difference to your company whether they wrote a bond for an individual or one of the major operating companies. Do you know whether or not your companies have ever expressed to you, or have your companies ever expressed to you a decision that they would prefer not to write the bonds for individuals and that they would rather confine it to—or that they would rather not have individuals or that they would rather have individuals?

A. Yes, sir.

Mr. Hull: We object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Hull: Exception.

A. Yes, sir.

By Mr. Cund:

Q. Then, what is the policy of your companies in reference to that matter?

A. Well, I submitted one of these bonds about two weeks ago and had quite a good deal of correspondence about it, and I received a letter back from them stating——

Mr. Hull (interrupting): We object to his testifying as to the contents of any letter.

The Court: Sustained.

Mr. Cund: Exception. That is all.

(Witness excused.)

[fol. 78] A. D. Hudspeth, called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Twyford:

Q. State your name, please, sir.

A. A. D. Hudspeth.

Q. Do you live here in the city?
A. Yes, sir.
Q. Are you an oil operator?
A. Yes, sir.
Q. How long have you been in that business?
A. Since 1914.
Q. And you are one of the plaintiffs here?
A. Yes, sir.
Q. Are you familiar with this block 9 Mead's Addition location?
A. Yes, sir.
Q. Are there any producing wells offsetting that location on the southeast?
A. There is a producing location 610 feet southeast of the well.
Q. What is the name of that well?
A. Slick well.
Q. How big a well is that?
A. Reported on the first twenty-four hour gage—that is on the first hour gage and figured by twenty-four hours, it runs 86,000 barrels.
Q. About when was that brought in?
A. About three weeks ago.
Q. Did it make any trouble?
[fol. 79] A. No.
Q. How far is this Hurt well, known as the Skelly-Hurt well, how far and what direction is that from block 9, the block 9 location?
A. Approximately 800 feet south and 100 feet east.
Q. It is just outside the corporate limits too, is it?
A. It is just a hundred feet off of High Street.
Q. How big a well is that?
A. The last gauge we had on it, I think, was around 80,000 barrels a day, twenty-four hours.
Q. Were you there when it came in?
A. Yes, sir.
Q. Did it hurt anything?
A. No, sir.
Q. Now, the city dump ground or the dump that is supposed to be owned by the city, is directly south of the block 9 location and across Reno Avenue, is it?
A. Yes, sir.

Q. There are two or three locations on that?
A. Yes, sir.
Q. None of them in yet?
A. No.
Q. Now, you made the location on block 9. At the time you made it was it right in the dump itself?
A. Yes, sir.
Q. What did you have to move away or what did you do there and what was the condition of it at that time?

[fol. 80] Mr. Hull: We object to that as incompetent, irrelevant and immaterial. It doesn't make any difference what he had to clear off to start his location.
The Court: Overruled.
Mr. Hull: Exception.

A. I had one crew to go in there to remove the human refuse, and they quit me, and I hired another crew, and I hired three different crews there before I got that work done.
Q. In other words this well is right in the middle of the dump there and surrounded on four sides by it?
A. Yes, sir.
Q. And you had to remove the human excrement and run the hogs out?
A. Yes.
Q. Are you familiar with the modern equipment they are using now in this field such as they used on the Skelly well close to this well and the Slick well offsetting this well and other wells down there, bringing them in to prevent the well from getting away?
A. Yes, sir.
Q. You are a practical engineer, are you, from that standpoint, a mining engineer?
A. Yes, sir.
Q. In your opinion is there any hazard in bringing in a well in such a location as block 9 Mead's Addition and the Reinhart & Donovan well, East Grand Avenue Addition?
A. I wouldn't think so unless it would be negligence.
[fol. 81] Q. Unless it would be negligence. To use the modern, proper equipment——
A. (Interrupting.) Yes.

Q. Do you intend to do that on these wells, use moder- and proper equipment?
A. Yes, sir.

Mr. Hull: We object to that as incompetent, irrelevant and immaterial, what he intends to do.
The Court: Sustained.

By Mr. Twyford:

Q. Well, is it expensive, is it prohibitively expensive?
A. No, sir.
Q. Now, do you entertain the same opinion as to the block 15 Eckroat Addition?
A. Yes, sir.

Mr. Hull: What do you mean, the same opinion?
Mr. Twyford: As to whether or not there is any hazard or danger to the surrounding country there in bringing in the well if they had the modern equipment mentioned.
The Witness: Not if you follow the rules of the Corporation Commission.

By Mr. Twyford:

Q. That this other witness has testified about?
A. Yes.
Q. Are they doing that now and do you intend to do that?
A. Yes, sir.

Mr. Hull: We object to that as incompetent, irrelevant [fol. 82] and immaterial what his intention is.
The Court: Sustained.

By Mr. Twyford:

Q. Now, Mr. Lemen was asked about other wells around the Eckroat location that he didn't know about. Where are the wells, if you know, with reference to that location?

A. Well, the Holmes No. 5 is southeast about 600 feet, and wells are drilling northwest in the next block, the corner northwest, and east.

Q. Now, as a matter of fact, that well that is in the block northwest is right up against houses, isn't it?
A. Yes.

Q. Much nearer than the well of yours?

A. Yes, sir.

Q. How far is it from the Lindsay No. 5, that large well there, how far is the Eckroat location from that?

A. I never measured it, but that is on the north part of that sixty acres there of the Holmes tract, and I wouldn't think it is over six or seven hundred feet, across a couple of blocks. That 15 is in the southeast corner of the northwest corner of 10 in block — there is one block south of that that is in the extreme southeast corner of the northwest quarter.

Q. That shows on this large map here, doesn't it?

A. I think it would if that is a correct map.

Q. Well, that has been used here.

A. Yes, here it is right here (indicating).

Q. Now, I have my finger on the figure 10 which is the [fol. 83] center of section 10, and there is block 15 has a black lead pencil ring around it here.

A. This is the quarter section line here.

Q. Running east and west and——

A. (Interrupting.) Yes, here it is.

Q. In other words, there is a half block between our location, the one we are talking about, and the Lindsey well that came in, No. 5, south there in the corner.

A. Yes.

Q. Now, there is a Mabee well that came in too east there. Did they have any trouble with that?

A. No, they haven't had any trouble with that well.

Q. Now, the location you spoke of is nearer the houses and northwest of your location and indicated here as block 13, Eckroat Addition, and that is the location you referred to?

A. This is the Phillips well here.

Q. Right southwest about a block?

A. That is Phillips here.

Mr. Twyford: That is all.

Cross-examination.

By Mr. Hull:

Q. Mr. Hudspeth, with these modern appliances that you spoke of as now being used in this Oklahoma City field, did you ever know of those threads being cut out by the sand?

A. Yes, if they are foolish enough to leave them open long enough.

Q. The gas pressure forcing the sand up through there cuts the threads out, is that correct?

[fol. 84] A. If you leave them open long enough it will, yes.

Q. And if your operators or your operatives don't watch those, and if they are not careful about it, why, the first thing you know it will blow your control head off, won't it?

A. No, you have two gates on there, Judge——

Q. (Interrupting.) There is the judge; pardon me.

A. I beg your pardon. They have two gates on there and if they go cutting you can close one of them.

Q. You are assuming that one of them is in perfect order at all times?

A. That is the object of it.

Q. That is the object, of course, but it has happened that both of them have been out of order, hasn't it, and that the well has gotten out of control?

A. No, I don't know of any well that has gotten out of control where they had the two gates. They probably cut some, but they haven't——

Q. (Interrupting.) The only reason they haven't gotten out of control is because the employer has been careful in noticing that condition and remedying it before it did get out of control?

A. Not necessarily. It is owing to the gas pressure.

Q. And the gas pressure in this field is still a very uncertain quantity?

A. Some haven't got hardly any at all.

Q. And some have more than they know how to handle, that is true, isn't it, Mr. Hudspeth?

[fol. 85] A. No, I couldn't say that. I think the biggest gas that has been taken care of is right out here at the edge of town.

Mr. Hull: That is all.

Redirect examination.

By Mr. Twyford:

Q. As a matter of fact you helped bring in one right across from this Meads Addition where there is plenty of

gas and you had no trouble in shutting it off with the extra gate when it commenced to cut the threads on the first gate?

A. Yes.

Q. If they had had those modern appliances on the Mary Sudik and the Sigmon, what is your opinion, as an expert, as to whether they would have gotten away or not?

A. Well, I wouldn't think so, no.

Q. They didn't have them?

A. No.

Q. This Skelly well about 850 or 800 feet south of Meads Addition, that was a bigger well, wasn't it, than the Mary Sudik well?

A. I don't know what the Sudik well made. I never had a gauge on it. I never got a report——

Q. (Interrupting.) You said 80,000.

A. The Sudik?

Q. No, the Skelly.

A. Yes.

Q. That was taken care of easily?

A. Yes.

Q. And that was right there?

[fol. 86] A. Yes.

Mr. Twyford: That is all.

Recross-examination.

By Mr. Hull:

Q. When the British-American brought a well in about eighty feet or such a matter from the school house out there, they had to close the school down and it has been closed ever since, hasn't it, because of the threads cutting out, and they are now transferring all those pupils all over the north end of town?

A. I don't know why they closed the school, but the gas—during the time the well was open the gas was more or less dangerous. I don't think the well got away.

Q. The gas got away and they had to close the school on account of it, isn't that true?

A. When they had the well open the gas, of course, went into the school house and they closed it in and if they closed it properly—I don't know anything about that in particular.

Q. You don't know why the school is still closed down, then?

A. No.

Q. But, you know it is closed, don't you?

A. No.

Mr. Hull: That is all.

Redirect examination.

By Mr. Twyford:

Q. There are no school houses near these locations at all, are there, the Meads Addition or the Reinhart & Donovan?

A. No.

[fol. 87] Mr. Twyford: That is all.

(Witness excused.)

Knox L. Garvin, called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Twyford:

Q. Mr. Garvin, you are one of the plaintiffs and you have been s-orn?

A. Yes, sir.

Q. Do you know where these three locations are they are testifying about in this case?

A. Yes, sir.

Q. Now, this first location that you call block 9, what is the situation around there with reference to whether that surrounding territory, say within a radius of a quarter of a mile of that location, as to whether or not there are any residences or businesses carried on within that radius?

A. There are not.

Q. What is there within that radius?

A. There is a dump ground north, west, south and southwest, and immediately east and southeast there is the oil field.

Q. How long have you been engaged in the oil business?

A. Oh, twelve or fifteen years. How long has it been since 1914?

Q. Well, since that time you have been engaged in the oil game?

A. Yes.

Q. Have you ever had any experience in drilling any wells?

[fol. 88] A. Yes, sir.

Q. In other fields than Oklahoma City?

A. Yes, sir.

Q. Have you been in towns where they had oil wells within the corporate limits of the town near residences and businesses?

A. This is my first experience in that.

Q. You haven't been in towns where they had that?

A. No, sir.

Q. Were you ever in Burkburnett, Texas?

A. I was in Burkburnett but I wasn't operating there.

Q. I know that, but I mean have you been in towns where you have seen them drill wells within the business and residential districts?

A. Yes, I have been in Burk, yes.

Q. You know they do drill there and drill them all over that town, don't you?

A. Yes, sir.

Q. What I was going to ask you is this: From your observation and experience, have you ever seen in those [fol. 89] towns you have visited large oil and gas wells among the residence and business districts and have you ever seen any injury to property or business by those wells?

A. No, sir, except oil on buildings. I have seen oil wells that flowed on the buildings in Burkburnett. During the completion of the well the well would flow and they would leave it open and let it clean itself and it would get on the location immediately adjoining the building.

Q. That would be where the location would be property on the same lot with the residence house?

A. Yes, sir.

Q. Did those wells down there make gas?

A. Well, they were large wells. They were not as large as these Oklahoma City wells, but there were wells there that made as much as two thousand barrels per day.

Q. I see. There was considerable gas or enough gas to flow them. They flowed?

A. Yes.

Q. Mr. Garvin, you are familiar with the surroundings around this location in Block 9 down here, now, and have you seen them bring other wells in in Oklahoma City here?

A. Yes, sir.

Q. And with the way they bring them in here now?

A. Yes, sir.

Q. And what is your opinion about the hazard of bringing a well in located as this well is, to the surrounding property down there?

[fol. 90] A. There is no hazard in completing one of these wells, as the witnesses ahead of me have stated, where the proper equipment is used in completing them.

Q. What is the proper equipment? Just tell the court briefly?

A. The well shall be—on the casing of the wells they place two high pressure gate valves on the top of the well and they build what we call in the oil field, a Christmas tree, and it is a bunch of various connections leading away from the well to the pits and to the tanks, and this is all high pressure equipment, stuff that was not made at all prior to this Oklahoma City field. In the equipping of these wells with these va-ves there is two of them below the floor under the derrick, down below in the cellar, and then leading away from the well there is a release into the pit where you can always open a valve and relieve your pressure on your gates and open and close them. Away from this well back thirty to fifty feet there is a welded pipe with grips on it for employees to close these wells without having to get up close to them, and up to date there has never been any one of these well pressure valves or gates that has bursted or been spoiled in closing it. During the process of the drilling of this well in the upper sands, after your nine inch is set, they have what we speak of as a blow-out preventer. This sets in on top of your casing and around your drill pipe with a stuffing box which you set the weight of your pipe on this blow-out preventer, and it closes it entirely. The weight of your pipe is greater than your pressure from below and it immediately stops the blow-out from [fol. 91] your well, and there is a valve, then, that goes into the pit that you can connect your pump with, and you pump heavy mud back through into your well to kill any pressure from below.

I believe that answers your question.

Q. What about the mud trap?

A. The mud trap is similar to the gas separators that is used in a flowing well that you can connect a well that is close to buildings to in completion, and as your well comes in your mud goes through this trap and separates your gas from your mud and force it through the vats and thence into the air and your mud goes into the pit.

Q. Is that a recent invention or discovery?

A. I don't know *if* it being used until recent months herein the Oklahoma City field. I never heard of it until recently.

Q. You take your well a half mile from this location, the one called the Reinhart & Donovan. You are familiar with the surrounding situation there, are you not?

A. Yes, sir.

Q. Do you know where this cement plant is?

A. Yes, sir, it is immediately adjacent to our property to the north.

Q. Is there any well there on the cement property?

A. Yes, sir.

Q. Is that on the property of this same plant?

A. As I understand it it is on the Reinhart & Donovan property.

Q. I am talking about the Western Paving Company.

[fol. 92] A. Yes, Western Paving.

Q. Is there a well on their property or drilling there?

A. I understand it is on their property. I don't know, but the rumors in the field there is that it is on the Western Paving Company.

Q. Is that near their plant?

A. It is possibly two hundred feet.

Q. Is it as near the plant as this well you are drilling?

A. It is considerably nearer.

Q. Now, there has been some testimony here about there being some residence cottages on Reno Avenue. What direction would that be from this?

A. Southeast.

Q. Southeast of this?

A. Of this location across the railroad.

Q. Are there any wells near these cottages other than this location of yours?

A. The nearer cottages to our location are, I would say, approximately the same distance as the Phelps-Walnut Grove well immmediately southeast of us. These cottages lay about half way between the two locations.

Q. This Phelps well, is it producing or has it been brought in?

A. No, it is a drilling well.

Q. But, it is as near these cottages as your well is?

A. Approximately the same; not very much difference.

Q. Now, the other location, the Eckroat location, are you familiar with the situation there and the surroundings? [fol. 93] A. Yes, sir.

Q. You heard the engineer's description of the distance?

A. Yes, sir.

Q. And of the cottages that he described as around this location?

A. Yes, sir.

Q. In your opinion can that well be brought in there without any hazard there to that property surrounding or to persons living there?

A. Yes, sir.

Q. Are there wells in that vicinity as near to residences as this well is?

A. We are the only well I know of drilling in the Addition there that has a full block without residences. The half block that we are on has no residences and approximately all of the south half of the block north of us has no residences and to the east of us it is sparsely settled and to the west of us I believe the block is completely settled and the other locations, a good many of them have had to move houses to get room to drill.

Q. Where are these locations you speak of?

A. One particularly is the British-American location diagonally across, a diagonal offset northwest of us.

Q. Near this?

A. Yes, and there are two other wells in the northeast of the southwest of 10 that had to move buildings and move them away in order to drill their wells.

[fol. 94] Q. Have any of them been brought in?

A. Two have been completed. The British-American hasn't been completed unless it was completed today.

Q. The other two have been completed?

A. Yes, sir.

Q. How far are those two wells from this particular Eckroat location of yours? Give us the approximate number of feet if you can, Mr. Garvin.

A. Block 15 is the British-American and the Eckroat Addition is approximately—those blocks are about 400 feet, aren't they? It is about 600 feet. It is on the west end of the block.

Q. It is a diagonal offset you say?

A. Yes, northwest, and the other locations, I believe, are in blocks 10 and 11 in the Schillings Addition. Is that right?

Mr. Hull: I don't recall offhand. That is correct, I understand.

A. Ten and eleven Schillings Addition, and that would be about—it is a block and a half south of block 10, so that would be two and a half blocks south of block 11 and whatever the distance- of the block- are, that is it.

Q. Those wells have been drilled in and are now producing wells?

A. Yes, sir.

Q. And they have residence houses and other places of business up there?

A. They are right in the middle of thickly settled areas. [fol. 95] Q. Is there any injury to properties around them that you know of?

A. Not that I know of. They were brought in through mud traps and were not allowed to flow in the air, as I understand it. I wasn't present at the completion, but that is the way I understand they were completed.

Q. In reference to this bond, have you received any permit from the City?

A. No, sir.

Q. You applied for a permit?

A. Yes, sir.

Q. But never received it?

A. No, sir.

Q. Now, one of the conditions of this—in order to secure this permit, I understand they require a $200,000.00 bond, is that right?

A. Yes, sir.

Q. Now, have you made investigation about what you would have to do to secure a surety bond for two hundred thousand dollars?

A. Yes, sir.

Q. From that investigation just tell the court what you learned?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial and it doesn't go to the question of the validity of this bond requirement.

The Court: Overruled.

Mr. Hull: Exception.

A. I learned that we would have to qualify to make this [fol. 96] bond with collateral in the amount of a quarter of a million dollars, $250,000.00 to make this bond.

Q. What would there be to that collateral?

A. It would be negotiable securities or cash.

Q. Would that be for each bond?

A. Yes, sir.

Q. Do you have to make a bond for each well you drill?

A. Yes, sir.

Q. Then on these three wells you would have to make three $200,000.00 bonds, as I understand it?

A. Yes, sir.

Q. And you would have to qualify for that much property in each instance?

A. Yes, sir.

Q. Or $750,000.00 in all?

A. Yes.

Q. Now, what is the nature of the collateral?

A. Well, it was—it would be negotiable securities or cash.

Q. Well, is it what we call liquid assets?

A. Yes, sir.

Q. What premium do they charge?

A. Ten per cent premium.

Q. Ten per cent on that?

A. Of the gross of the bond, $2,000.00 per bond.

Q. What would the premium be for twelve months?

A. Two thousand dollars.

Q. For each bond?

[fol. 97] A. Yes, sir.

Q. Now, did you tender a personal bond to the city?

A. I wanted to go into it on that basis and was told that they were unable—that they couldn't do that.

Q. They refused?

A. They refused to do it. I was ready to tender it and discussed it.

Q. For what sum?

A. The sum wasn't discussed. They said they couldn't go into it.

Q. The sum wasn't discussed?

A. No.

Q. Something was said about your having paid the fee, $1,000.00. Is that what they charge for each permit?

A. Yes, sir.

Q. Did you pay the fee?

A. He deposited a certified check on each application for a thousand dollars, yes, sir.

Q. You just deposited that?

A. Yes.

Q. It hasn't been paid?

A. I believe the city treasurer is keeping it in escrow. He receipted the building commissioner as having it.

Q. How did you deposit that?

A. With the application.

Q. Did you have any other condition to it? I mean, Mr. Gravin, was it or was it not under protest, or do you recall [fol. 98] about that?

A. I can't answer that.

Q. Were you able to make that bond?

A. No, sir.

Mr. Twyford: That is all.

Cross-examination.

By Mr. Hull:

Q. Did you ever present the matter to the City Council of your inability to make a surety bond, and ask them for authority to make a personal bond?

A. No, sir.

Q. How did you go about it and who did you talk to about it?

A. Mr. Kelly.

Q. The Secretary of the Planning Commission?

A. Yes, sir.

Q. And the Clerk of the Board of Adjustment?

A. Yes, and the Assistant Municipal Counselor.

Q. Well, I beg your pardon, sir, but he was not the Assistant Municipal Counselor.

Mr. Twyford: I didn't get that argument.

Mr. Hull: There is no argument to it at all. I merely stated that Mr. Kelly was not the assistant municipal counselor.

Atty. for Defendants:

Q. You testified a while ago that a well could be drilled in this territory without any hazard. That is assuming, of course, isn't it, that every person that has anything to do with the drilling of this well would perform his duties with- [fol. 99] out any negligence?

A. I made that statement by experience, that we have had experience in this field and that is why I made it.

Q. Well, you just answer my question. You assume that everybody will perform this duties without negligence?

A. I don't know whether they have or not.

Q. I say, in order to bring a well in and not have any difficulty, it would require that everybody would perform his part of the work. If one man was negligent in the operation of the bringing in of the well, it might create a hazard, might it not?

A. No, not one man wouldn't. If it was carelessly handled generally there is a hazard, but one man making a mistake would not make a hazard out of it.

Q. It would not?

A. No.

Q. Two men might?

A. If it is generally handled carelessly and the equipment you use isn't the proper equipment, yes. We have had an experience of some—not as Gant & Garvin, but in the field we have had experience in the completion of thirty-seven wells, and surely some of those fellows have made a mistake.

Q. In the Oklahoma City field?

A. Yes, sir.

Q. There is always a possibility, what I am getting at, for a well getting away and that a well might get away?

A. Under certain management, yes.

[fol. 100] Q. It could get away, couldn't it?

A. Not under our management.

Q. You don't think it could get away at all under your management?

A. No, sir, I do not.

Q. But still there is that element of risk, isn't there, there? There is always the human equasion, as Mr. Hull says, that enters into it, isn't there?

A. I don't understand your question.

Q. There is always the element of risk that a well might get away?

A. Certainly there is a risk in anything.

Q. Now, do you know how much territory is included in the drilling zone inside the city limits?

A. I would say there is approximately some nine to twelve hundred acres and possibly fifteen hundred acres.

Q. And now in that territory about how much of it is settled up with residences?

A. Possibly fifty per cent.

Q. And part of it is in small business, industries, and so forth?

A. Well, there is not very much business in the drilling zone. There has been considerable buildings built on east "G" Street and some business houses in Capitol Hill, filling stations and the like of that in the drilling zone.

Q. But once in a while in the various sections of the drilling zone there is a little community business, though, is there not?

[fol. 101] A. I am trying to follow your line of questioning in my mind. Very little.

Q. Down on G Street you know there is some business?

A. Oh, yes, that has been put in there in recent months. It come in between the drilling wells in recent months.

Q. Supply stores and filling stations and oil field cafes and such as that?

A. Yes.

Q. Are there any little grocery stores along there?

A. Oh, yes, they are all through there.

Q. There are some grocery stores that were on G Street before the Oklahoma City field was opened, aren't there?

A. I wasn't familiar with G Street prior to the opening of the field.

Q. You don't know much about that?

A. No.

Q. On farther west of where you are drilling and in the drilling area and south of the river, there are a good many residences?

A. Yes, up to the Schilling and Eckroat Additions there are some nice residences and nice residence districts.

Q. What is the construction mostly, brick or frame?

A. Oh, there is probably ten per cent brick and the balance frame.

Q. I believe you testified something about the sanitary sewer a while ago. Does it go through this property on which you are drilling?

A. I didn't testify to it.

[fol. 102] Q. Didn't you?

A. No.

Q. Well, I beg your pardon. Do you know where the main sanitary sewer of the city is located?

A. No, sir. I know that there is a sewer ditch between our two wells and the southeast quarter of 34 out here.

Q. Is it an open ditch?

A. It sounds like it. It is pretty loud along there.

Q. I mean by that does it pass through a concrete pipe or is it just an open——

Q. (Interrupting.) I think the concrete ends along around Reno there.

Q. That is probably the mouth, then, where it discharges?

A. I think it does. It is a ditch from there on to the river, I think.

Q. That is not a sanitary sewer, though, is it? It is a storm sewer, isn't it?

A. I don't know what it is. I just know there is a sewer comes through there.

Q. Now, there is a draw that goes through this property, is there not?

A. The old river bed, I think, goes through there.

Q. The old river bed?

A. Yes, I think so.

Q. Is there any other draw through the property besides the old river bed?

A. I am not sure it is the old river bed, but I believe it *is*.

[fol. 103] There is a drain down through there.

Q. Now, in the operation of your well is it possible for the oil or some of the salt water or some of the properties that you take from the well, to escape into this river bed?

A. There is always that probability.

Q. You have that there also.

A. To familiarize the court and you too how this is handled, I would like to explain that, if it is in order.

Q. Certainly, I want you to let the court know all there is about it.

A. The way those things are handled, when the well begins to make salt water they build what they call a B. S. pit on the lease and pump this salt water and waste oil in, and if it is in excessive amounts to where the sand won't take it up, it is pumped into a pipe line and removed from the field. Now, then, the chance for that to happen, the question you asked, would be this: If this pit would get full or practically full and then there would come a big, dashing rain which would break it, if that happened it would go away diluted so that it wouldn't do a great amount of damage, if any.

Q. Then, under that kind of a condition you might have salt water and what B. S. or oil mixture there was, go down the draw of the river bed, if it be such?

A. And get mixed up with the sewer, yes.

Q. You are familiar with this ordinance of the city, are you not?

A. Well, as much as a layman could get.

[fol. 104] Q. You are familiar with this section 24 which makes it an offense to turn that class of stuff into the streams or into any of the draws within the city limits, are you not?

A. I didn't know that they had that kind of an ordinance.

Q. You didn't know that?

A. No.

Q. If it is in there that is one element that would enter into your bond, isn't it?

Mr. Twyford: Now, we object to that, if the court please.

The Court: Sustained.

Atty. for Defendant: Exception.

By Atty. for Defendant:

Q. Now, you testified with regard to the execution of the bond. Do you know how many operators in the field have brought in wells and have failed to make bonds?

A. I don't suppose there are any. I don't know of anyone in the city limits that has completed a well without a bond.

Q. All this- inside the city limits, so far as you know, that have brought in a well, all of them have executed bonds?

A. I haven't asked a one whether they have or not, but I assume by the requirements made of us, that the others have completed their wells with bonds made.

Q. You know, as a matter of common knowledge, that they all have, don't you?

A. Well, I assume so.

Q. And in your instance you think the main difficulty is because you are not able to qualify with a surety company [fol. 105] that would write the bond, that that is why it operates to your detriment, don't you?

A. Yes, sir.

Q. That is your whole lawsuit?

A. We got as far as we could go with meeting the requirements of the city.

Q. Now, you have made an application to the Building Commissioner for a permit to drill on these three tracks, have you not?

A. Yes, sir.

Q. Did he grant you a permit in either instance?

A. No, sir.

Q. Did he turn down your application?

A. Yes, sir.

Q. Then what became of your proceedings?

A. The one application he didn't turn down, the Reinhart & Donovan, but on the other two he did.

Q. On the Reinhart & Donovan he granted you the right to drill on the condition that you execute the bond and pay the fee?

A. Yes, sir.

Q. And you haven't done either one?

A. We paid the fee.

Q. You deposited the money but you haven't executed the bond?

A. No, sir.

Q. In the other two cases, what became of them?

A. They were up to the Board of Adjustment and we had a hearing and they ruled on it and ordered to- Building [fol. 106] Commissioner to make the permit.

Q. To grant you a permit?

A. I believe that is the way it is handled.

Q. You got an order from that Board to grant you the permit?

A. It hasn't been delivered back to him, or wasn't a week ago when I was down there, but I understand it has been since.

Q. But, you were advised that the Board of Adjustment had granted you the right to drill?

A. Yes, sir.

Q. And, among the conditions was the condition that you execute a bond?

A. That is one of the requirements of the building commissioner. They don't have anything to do with the bond.

Q. But, in the order your right to drill was conditioned by the Board of Adjustment, was it not, that you comply with the ordinance on that condition and especially that you execute the bond and pay the fee?

A. I don't think it required us to make bond; I wouldn't be positive and I can't answer that positively.

Q. Did you read the order?

A. No, sir.

Q. You haven't read it?

A. No, sir.

Atty. for Defendant: That is all.

Mr. Twyford: That is all.

(Witness excused.)

[fol. 107] Walter H Gant, called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Twyford:

Q. Mr. Gant, you are one of the plaintiff- in this case?

A. Yes, sir.

Q. You live in Oklahoma City?

A. Yes, sir.

Q. Are you familiar with this oil field?

A. Yes, sir.

Q. What is your business, Mr. Gant?

A. In the oil business.

Q. How long have you been in that business?

A. Since 1914.

Q. Have you had experience in other fields before coming to the Oklahoma City field?

A. Yes, sir.

Q. Mr. Gant, how many wells have you assisted in drilling in Oklahoma City since this field opened?

A. About thirty-nine since the field opened?

A. Thirty-nine wells?

A. Yes, sir.

Q. And where was the locality?

A. Well, I was vice-president of the Wirt Franklin Petroleum Corporation, and on the executive board until the 1st day of June, and we drilled ten wells on the Lowry and we drilled on the Minnie Page and on the Wright, and all [fol. 108] told we drilled about thirty-seven wells, and then I was vice-president of the Arolo and we drilled in section 11, and had a 200,000,000 feet gasser in section 11, making 5,000 barrels of oil and I was interested in the Smith-Wright well, and then Mr. Garvin—we together brought in a well, 154,000,000 feet two weeks ago just below the townsite in section 2.

Q. Mr. Gant, are you familiar with the three locations involved in these three cases?

A. Yes, sir, fairly well.

Q. You know where this block 9 is, this first well we have asked about?

A. Yes, sir.

Q. You know what the situation down there is?

A. Yes, sir.

Q. And as to the surrounding territory?

A. Yes, sir.

Q. Now, from your experience in the oil business and in the drilling of these wells here in Oklahoma City, in your opinion is there any hazard in the drilling in of this well in block 9 to the surrounding property or around that within a radius of a quarter of a mile?

A. No, no more than drilling any other well.

Q. What would you say as to the location west of there a half mile?

A. The same condition would apply.

Q. Do you know where the Eckroat well is here?

A. Yes, sir.

[fol. 109] Q. Do you know where the locations of the other wells are around it there?

A. Well, I wouldn't—not so well, not to designate the individual wells, no.

Q. Do you know where that British-American well is they talk about?

A. I know just about where it is, yes.

Q. That is a diagonal off-set from the location you are drilling there, I believe?

A. Yes.

Q. Well, what would you say with reference to the situation around the British-American as compared with yours?

A. We are in better condition to bring a well in that they were because they had to move houses to get their location, and we did not.

Q. Do you think there is any hazard to surrounding homes and houses there in bringing a well in in your Eckroat location?

A. No. I think through a sand pit we will never have to let that well flow to the open to flow it. We will open that well up through a sand pit and separate the mud and oil there.

Q. Now, Mr. Gant, you are familiar with the latest equipment and machinery and so forth that is used to bring these wells, are you not?

A. Yes, sir.

Q. You heard Mr. Garvin's testimony along that line?

A. Yes, sir.

Q. Do you think that those wells can be brought in in the [fol. 110] manner that he described?

A. Well, we will have a gas blow-out protector on each well. All of the wells we have drilled since the Mary Sudik well blew out, we have had gas blow-out protectors, that is the Wirt Franklin Corporation and the Arolo, and the well Mr. Hudspeth, Mr. Garvin and I finished two weeks ago.

Q. Have you ever had any trouble in the wells you have drilled?

A. No, sir.

Q. None of them got away from you?

A. No, sir.

Q. And none of them did any damage?

A. No, sir, we have had no damage. We haven't had a lawsuit in the Oklahoma City field of any kind.

Q. Now, Mr. Gant, do you carry compensation insurance?

A. Yes, sir.

Mr. Hull: We object to that as incompetent, irrelevant and immaterial.

Mr. Twyford: I hardly think it is. He is required by law to carry that and they are making that one of the conditions in this bond.

Mr. Hull: No, we are not.

Mr. Twyford: We will get to that.

The Court: Overruled.

Mr. Hull: Exception.

A. Yes, sir, we do, and public liability.

Q. Is there a regulation of the Corporation Commission covering the impounding of oil and salt water on leases in the State of Oklahoma?

[fol. 111] Mr. Hull: We object to that as incompetent, irrelevant and immaterial and not the best evidence.

The Court: Sustained.

Mr. Twyford: I didn't ask him what it was. I asked him if there was one. I think that is perfectly competent because he asked about if that would be in the Commission's bond and that comes along the line we expect to present to this court at the end of this testimony.

The Court: The fact that there is a regulation would not keep them from violating it.

Mr. Twyford: No, but it shows that they are tying into the same field of activity that the Corporation Commission and the law of this state have gone into. I think the court should permit the question and then you can rule it out later, if you wish, as I haven't the time to present the authorities to you at this time. You see, we have a statute on that which I could present to the court.

The Court: Sustained.

Mr. Twyford: Exception.

By Mr. Twyford:

Q. Now, you have applied for a permit to drill these wells to the city?

A. Yes, sir, and paid our $1,000 in under protest in each case for the permit.

Q. Now, have you complied with the ordinance in so far as you have gone with the exception of making this bond?

A. Yes, so far as it has been possible on our part. The [fol. 112] city might ask that we let certain royalty owners join in on a well which leaves it up to the royalty owners and not up to us, so we have complied up to the bond so far as we could.

Q. At this time, if I understand, the city is ready to issue the permit save and except the requirement, and that they insist that you meet it, of filing this bond of a surety company for $200,000?

A. Yes, that has developed the last while, yes, sir.

Q. You heard Mr. Garvin's testimony along that line, did you not?

A. Yes, sir.

Q. Have you made investigations yourself as to other people?

A. As to other people?

Q. Yes.

A. No.

Q. No, I don't mean as to other people, but have you made any investigations yourself as to the policy of the bond companies in making this particular class of bond?

A. No, I have not.

Q. You don't know about that?

A. No.

Q. Mr. Gant, have you been in different cities in Texas—I know of several down there—that have oil wells right in amongst the homes and the businesses, and have you visited those cities, such as Breckenridge and Ranger and Burkburnett?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial what they do in Texas.

[fol. 113] The Court: Sustained.

A. Yes, sir, I have——

Mr. Hull (interrupting): Wait a minute.

Mr. Twyford: Yes, the objection was sustained.

By Mr. Twyford:

Q. Are there any here in Oklahoma that you recall now where oil wells have been drilled within the corporate limits of any of the towns of this state.

Mr. Hull: We object to that unless he precedes his answer or qualifies his question to similar fields to the Oklahoma City field.

Mr. Twyford: That is a matter of cross examination, I submit to the court.

Mr. Hull: Otherwise, it is incompetent, irrelevant and immaterial.

The Court: Sustained. This field may be very different from other fields.

Mr. Twyford: That is true, but I think that is a matter of cross examination. I think gas is a hazard wherever it would be if it gets away, and it makes no difference whether it is twenty million or a hundred. It would blow you up just the same, and there is no doubt about that, unless it is taken care of.

By Mr. Twyford:

Q. Have you been in fields in Oklahoma where the wells were making gas?

A. Yes, sir.

Q. And those wells were within the corporate limits of the city?

[fol. 114] Mr. Hull: The same objection we urged to the previous question. It is wholly immaterial unless a similar situation exists.

The Court: Do you mean high gas pressure?

A. Well, Judge, this is the deepest production in the state and naturally the highest pressure. Gas pressure runs about 14 feet per hundred pounds—14 pounds per hundred feet, so if you are drilling a 3,000 foot gas well in, the maximum gas pressure should be about 1200 pounds, and if you are drilling a 6,000 foot well, the maximum gas pressure should be about 2,400 pounds. Now, we overcome that by the character of material we use. We may use 12 pounds, 6⅝ in a 1,200 foot well, and out here we would probably use

30 pounds in the same. We have an excess reserve in all of our material in all fields as against pressure, and these wells do run up to 2,400 pounds. As to the volume, the depth has nothing to do with volume. I have had seventy million foot gassers at 2,000 feet, and I have ten million foot gassers at 2,000 feet, and out here you may have a well with little gas, and they do out here, and we had one with 154,000,000 feet. So, pressure is dependent upon depth, but volume is not.

Mr. Twyford: That is the point I had in mind, the volume, if the court please, but I don't understand that it makes any difference. That is all.

Cross-examination.

By Mr. Hull:

Q. Mr. Gant, you say you brought in thirty-nine wells in [fol. 115] this field without any of them getting away?

A. Yes, sir.

Q. There have been other operators whose wells did get away in this field?

A. Not since they put the gas protectors in.

Q. There have been other operators in the field whose wells did get away and your own witness testified to twelve of them?

A. Yes, sir.

Q. And those wells that did get away, whether they were due to negligence or due to inadequate *de*quipment or due to a lack of knowledge as to the character of equipment to be used, it is nevertheless a fact that they did get away and did do a large amount of damage?

A. No one was hurt in any of the wells that got away in this field.

Q. Do you know that in this court there are damage suits filed against the Mary Sudik well aggregating more than $300,000 for damage caused by that well getting away?

A. No, I do not know that.

Q. You wouldn't undertake to say that if the Mary Sudik well had been located in the heart of this city and had gotten away like it did, that there wouldn't be any damage?

A. No, I wouldn't say that at all.

Q. And you wouldn't think that?
A. No.
Q. I wouldn't think you would, sir. I believe that is all.

Mr. Twyford: That is all.

(Witness excused.)

[fol. 116] Otto Bradford, called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Twyford:

Q. Where do you live, Mr. Bradford?
A. Oklahoma City.
Q. What business do you follow here, Mr. Bradford?
A. I am the field umpire of the Oklahoma City pool.
Q. What do you mean by field umpire?
A. I have the supervision of the drilling, opening and shutting in of these wells.
Q. How long have you had that place?
A. Ever since they started.
Q. You are very familiar, I take it, with the field?
A. Yes, sir.
Q. You have seen a great many of these wells brought in?
A. Yes, sir.
Q. Do you know where these three locations are that are involved in this lawsuit?
A. About, yes, sir.
Q. Do you know especially where the location down in block 9 is?
A. Yes, sir.
Q. Do you know the situation surrounding that?
A. Yes, sir.
Q. You have heard the testimony about it?
A. Yes, sir.
[fol. 117] Q. Well, from what you know about it yourself and from what the testimony shows it to be, and from your experience here in the Oklahoma City field, would you say

there would be any hazard in drilling in that oil well out there?

A. Very little.

Mr. Hull: We object to that as incompetent, irrelevant and immaterial and the witness hasn't qualified himself at all.

The Court: Overruled.

Mr. Hull: Exception.

A. Very little if any.

By Mr. Twyford:

Q. What would you say as to the location west of there—I forget the name of it—the Reinhart location?

A. About the same thing.

Mr. Hull: The same objection.

The Court: Overruled.

Mr. Hull: Exception.

By Mr. Twyford:

Q. You have heard the description of the situation and circumstances surrounding that well here, have you not, by the other witnesses?

A. Yes, sir.

Q. And you know personally abo-t it yourself?

A. Yes, sir.

Q. And as to this Eckroat location, what would you say about that?

Mr. Hull: Same objection.

The Court: Overruled.

Mr. Hull: Exception.

[fol. 118] A. I would make the same answer.

By Mr. Twyford:

Q. Now, there has been some testimony here about some wells getting loose and beyond control. Has there, since the Mary Sudik well came in and this recent or modern equipment, we will call it, has been discovered and perfected, has there been anything of that nature happen in the field?

A. No, sir.

Q. What will you tell the court, then, has been your experience and observation in regard to wells getting beyond control for the last three to six months—I don't know what time, but since that occurred?

Mr. Hull: I beg pardon. I didn't get your question.

By Mr. Twyford:

Q. Well, for the past three to six months since that occurred?

A. There have been two of those wells, I think, that have happened in the last six months. I don't think of but two of those wells and that is all there has been.

Mr. Hull: That did what?

The Witness: Went wild.

By Mr. Twyford:

Q. Got out from under control?

A. Yes.

Mr. Twyford: I believe you may take the witness.

Cross-examination.

By Mr. Hull:

Q. Mr. Bradford, are you a practical operator?

A. I have been around it since 1913.

Q. What have you been doing in connection with oil? [fol. 119] Selling leases and buying leases or what?

A. I have bought and sold leases and been in the pipe line and refining business and also in field operation.

Q. In the actual operation?

A. I never drilled any myself, but I have been around drilling properties.

Q. Yes. So, you are not a practical operator?

A. No, I am not a driller, no, sir.

Q. Mr. Bradford, what did they close this school out here for the other day when that British-American well came in?

A. They claimed they closed it on account of gas.

Q. Because the well got away from them?

A. No, sir, that well didn't get away from them.

Q. They have kept that school closed for two weeks, haven't they?

A. The school is still closed and I don't think the well has been opened for that length of time.

Q. What was the reason they gave for closing the school?

A. They seemed to be afraid that that gas would be dangerous to the children in there, but the school is still closed and the well is also closed.

Q. Isn't it true that, generally speaking, when a well is opened and gas is permitted to escape, that it settles in the low places or that a certain percentage of it does?

A. To some extent, yes, sir.

Q. And it is apt to settle there for sometime before it is dissipated?

A. It doesn't stay very long after they close the well in. [fol. 120] Q. Well, what do you mean by very long?

A. Oh, probably six or eight hours or something like that, and by that time it is gone. I never have saw it hand any longer than that after a well is closed.

Q. Is that an inflammable gas?

A. No, sir. I dare say you could strike a match at the school house and you couldn't ignite it.

Q. What effect would it have on a human, on people?

A. It might be a little bit offensive, but it wouldn't hurt them. We work around it all of the time.

Q. Now in closed places. You work around it in the open air?

A. I have worked around it in closed places.

Q. Can you work in a room that is filled with that gas and that is closed?

A. Yes, sir, generally in these pump stations you will find ninety per cent of them filled with gas.

Q. And they are closed up so that there is no ventilation through there at all?

A. No, there are windows and doors like in any other building.

Q. You know there have been wells that have gotten away in this field?

A. Yes, sir.

Q. I believe you say since the Mark Sudik there haven't been any wells that have gotten loose but two?

A. No, I didn't say that. He said in the last three to six months.

Q. That was his last question. I understood his first [fol. 121] question to be since the Mary Sudik.

A. If that was the question I made a mistake. I thought he said in the last three to six months.

Q. The Sigmon No. 1 was after the Mary Sudik?

A. The Sigmon was after the Mary Sudik and Vincent 6 was after the Mary Sudik.

Q. Was the Stamper well——

A. (Interrupting.) That was way before it.

Q. So was the Kinter 5?

A. The Kinter 5 was before and Precure was sometime after the Mary Sudik.

Q. And wasn't there a well very recently that caught a fire, a gas well?

A. No. I don't know of but two fires. We haven't had but two fires. We have only had two fires in the field and that was the Stamper 3 and the Kinter 5. The other wells have gotten loose, some oil and some gas, but no other fires.

Q. Mr. Bradford, your statement that these wells could be brought in without any hazard or, I believe as you expressed it, brought in with very little hazard, you are basing that on the assumption that there will be no negligence in the operation of that outfit?

A. Well, there still could be some——

Q. (Interrupting.) I am not asking you that, but are you basing it on the assumption that there will be no negligence ?

A. No, I say there could be some negligence and still be no hazard.

[fol. 122] Q. The threads on the control valves could be worn out and there would still be no hazard?

A. If threads were worn out there would be a hazard, but nobody will put one on with threads worn out.

Q. You can't tell that won't be done when you have got the common element or the human frailty operating?

A. You can tell if the threads are worn out.

Q. Of course you can if you will examine them and look for them?

A. Sure.

Q. But you can't tell that a man will examine them and he may and he is presumed to, but there is not much certainty that he will?

A. There is not much certainty that he will get one on with the threads worn.

Q. It has happened.

A. Not that I know of. Threads have been cut after they put them on, but none put on with the threads worn.

Q. I didn't mean it that way, but I mean after they are put on that they have been cut?

A. Yes, oh certainly.

Q. And if you didn't watch for that and notice it and remedy it when it occurred, then you have got a great hazard?

A. If they cut after you have got them on, you will know it real quick.

Q. And it might be too late when you know it?

A. Not if you have got your gates on.

[fol. 123] Q. Not if you watch it and you are not negligent?

A. Yes, if you leave them wide open and don't attempt to cut them off, certainly it will get away.

Mr. Hull: That is all.

Redirect examination.

By Mr. Twyford:

Q. I would like to ask you one question. The state has inspectors and the city also has inspectors to watch those things, don't they?

A. Yes, sir.

Mr. Twyford: That is all.

Recross-examination.

By Mr. Hull:

Q. Has any state inspector ever inspected a well within the city limits, to your knowledge?

A. Not that I know of. I never go with him.

Q. But, you are around him all day long, some of the wells?

A. Not all day long.

Q. You are out in the field?

A. Practically all of the time.

Q. And you have never seen a state inspector inspecting a well within the city limits?

A. No, I never saw him personally.

Mr. Hull: That is all.

Mr. Brown: That is all.

(Witness excused.)

[fol. 124] H. H. WEGNER, called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Twyford:

Q. Mr. Wagner, what is your business here in Oklahoma City?

A. Drilling contractor.

Q. How long have you been in that business?

A. About twelve years.

Q. What have you got to do with this location in block 9 and to the other wells involved in these suits?

A. I am drilling the Reinhart; just have control of the well.

Q. You have the contract to drill that well?

A. Yes, sir.

Q. Have you had other experience in the Oklahoma City field?

A. Yes, sir, I have been drilling for the I. T. I. O. and Slick.

Q. How long have you been drilling for them?

A. I have been drilling for the I. T. I. O. ever since I went to Seminole in 1926 or 1927, I guess.

Q. You are familiar with the surroundings where you are drilling, then?

A. Yes, sir.

Q. Do you know where that well is on that cement property?

A. Yes, sir.

Q. The Western Paving Company?

A. Yes, sir, Slick's well, yes, sir.

Q. Is that Slick's well?

A. Yes, sir.

[fol. 125] Q. How near the paving company's plant is that well?

A. Oh, I really don't know.

Q. Well, is it as near as the one you are drilling?

A. I think it is, yes. I don't know how far the paving company's tract runs that way, but I think it is about the same distance.

Q. Do you consider it any hazard in the drilling of that well where you are drilling it?

A. No, sir.

Q. Would it be any hazard to bring a well in for oil or gas like they bring them in here in the Oklahoma City field?

A. No, sir, I wouldn't think so.

Q. Have you ever had any trouble bringing in a well here?

A. No, sir.

Q. Have you ever done any damage to any property or persons?

A. No, sir.

Q. Are you familiar with this location No. 9?

A. Is that the one in the hog lot?

Q. The hog pen they call it.

A. Yes.

Q. Do you know of that before the location was put there?

A. Yes, sir.

Q. What was it?

A. That was a dump ground full of tin cans and refuse there.

Q. Was it fit for human habitation before that was put there?

A. No, sir.

Q. You heard one of the witnesses describe what he had [fol. 126] to move before he put the location there?

A. Yes, sir.

Q. How long, to your knowledge, has that condition existed there previous to the time that this location for the drilling of this well was put there?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.
Mr. Twyford: Exception.

By Mr. Twyford:

Q. The drilling of the well at that location, is that, in your judgment, any hazard to surrounding property or people in that vicinity?
A. No, sir.
Q. Is the drilling of this well, in your judgment, any more dangerous or as much to the health and safety of the surrounding country, property and people, as the condition it was in before the location of the well was put there?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial. It is a matter of comparison and doesn't go to the validity of the bond requirement.
The Court: Sustained.
Mr. Twyford: Note our exception.

By Mr. Twyford:

Q. How many wells, Mr. Wegner, have you completed in this Oklahoma City field?
A. Four of them. Six when I complete these two.

Mr. Twyford: That is all.

[fol. 127] Cross-examination.

By Mr. Hull:

Q. Mr. Wegner, you brought a well in on this location—that is if you brought a well in on this location like the Mary Sudik was brought in, would it be a hazard?
A. Yes, sir.
Q. And like the Sigmon No. 1, would that be a hazard?
A. Yes, sir.
Q. If you had a gasser that caught afire like the Stamper No. 3 and the Kinter No. 5, would that be a hazard?
A. I don't think so. A gas well hadn't ought to hurt anything.
Q. Wouldn't you say a gas well like either of those gas wells were, would set fire to a house within a matter of a couple thousand feet?
A. No, I don't think it would, no, sir.

Q. You don't think it would?
A. No, sir.
Q. What distance do you think it would, Mr. Wegner?
A. Well, that would be kind of hard to tell.
Q. I appreciate that and it is just a matter of your best judgment?
A. Oh, I imagine it would have to get away three or four hundred feet.
Q. And the testimony here shows there are frame buildings within three of four hundred feet of these wells?
A. Something like that, I imagine. I don't know just what the distance is.

Mr. Hull: I believe that is all.

[fol. 128] Redirect examination.

By Mr. Twyford:

Q. If you had this modern equipment on those wells, that couldn't happen, could it?
A. No, sir, we would just close the gate on it and it would be all over with?

Mr. Twyford: That is all.
Mr. Hull: That is all.

(Witness excused.)

M. T. Smith, called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Twyford:

Q. Mr. Smith, what is your business?
A. Contractor.
Q. Have you contracted to drill one of these wells?
A. Yes, sir.
Q. Which one?
A. I have the one at Meads and Eckroat.
Q. Is that on block 9?
A. Yes, sir, we are drilling on block 9.

Q. How long have you been in the contracting business?

A. Well, I would say about thirty years.

Q. Have you drilled a great number of oil wells?

A. Yes, sir.

Q. Drilled oil wells before you got in the Oklahoma City field?

A. Yes, sir.

Q. How many have you drilled here in the Oklahoma City field?

[fol. 129] A. I would say these two we are on would make fourteen.

Q. Fourteen?

A. Yes, sir.

Q. Now, you are familiar with bringing in gas wells?

A. Yes, sir.

Q. And with bringing in oil wells?

A. Yes, sir.

Q. Both here in this field and other fields?

A. Yes, sir.

Q. And you are familiar with the surroundings out at this block 9 where you are drilling?

A. Yes, sir.

Q. And you know what is out there?

A. Yes, sir.

Q. Do you consider the drilling of a well there, the bringing in of a well there or the operating of a well there any hazard to surrounding properties?

A. No, sir.

Q. Would it be any hazard to any person that lived out in that country?

A. No, sir.

Q. Would you say that same thing was true as to the well a half mile west of there?

A. Well, yes, there is no danger there.

Q. Then the Eckroat well. Are you drilling a well there?

A. Yes, sir.

Q. That is in a different part of the city?

[fol. 130] A. Yes, sir.

Q. In your opinion is there any hazard to the property surrounding that well?

A. No, sir.

Q. By the drilling and bringing in or operating of that well?

A. No, sir, not with the modern equipment we have.

Q. Is there any danger to the people living in that vicinity?

A. No, sir.

Q. Have you ever had any trouble with either well that you have drilled?

A. No, sir.

Q. None of them have got away from you or out of your control?

A. No, sir.

Q. You have heard this testimony about the modern equipment and the way of bringing these wells in?

A. Yes, sir, I have used it.

Q. Do you use that in the drilling of wells?

A. Yes, sir.

Q. Are you furnished that equipment for the purpose of drilling these particular wells you are drilling now?

A. The companies furnish it, yes, sir.

Q. I say, you will be furnished that?

A. Yes, sir.

Mr. Twyford: That is all.

Cross-examination.

By Mr. Hull:

Q. Mr. Smith, even with all of your modern equipment, the human element is bound to enter into your operations, [fol. 131] is it not?

A. Well, there might be some, yes.

Q. And you can't always know that your employes are going to do what they ought to do and not permit some negligence to enter into their operations, can you?

A. We superintend our own work.

Q. You superintend them, but at the same time, do you remember the other day—I say the other day but not so long ago—when the British-American was drilling in block 13 of the Eckroat Addition pretty close to where you are drilling in 15 and they had a pipe down the street to pump their mud in and the man in charge of that went to sleep and the pipe broke and the mud went in the streets and

they had to clean up the streets with teams, do you remember that?

A. No, that didn't come to my knowledge.

Q. If that did happen it wouldn't save the well, would it, and the human element would enter into it?

A. Yes.

Mr. Hull: That is all.

Mr. Twyford: That is all.

(Witness excused.)

Mr. Twyford: We are through.

Mr. Hull: Now, your Honors, we want to renew our demurrer to this testimony on the ground that the proof, with all reasonable inferences to be drawn from it, is totally insufficient to constitute a cause of action and the most that it would do would be to make a fairly debatable [fol. 132] question as to the reasonableness of this ordinance, which is not sufficient grounds for the court setting aside the legislative will, and we urge also the other grounds of estoppel that I urged in my original demurrer.

The Court: We will adjourn until tomorrow morning at 9 o'clock.

(Whereupon a recess was had to 9 o'clock a. m., October 7, 1930, at which time the hearing was resumed and the following further proceedings were had, to-wit:)

[fol. 133] A. D. Hudspeth, recalled as a witness in behalf of the plaintiffs, testified further as follows:

Redirect examination.

By Mr. Twyford:

Q. Mr. Hudspeth, what will be the probably life of these wells in this Wilcox sand producing here in Oklahoma City?

Mr. Hull: We object to that as incompetent, irrelevant and immaterial and the witness not having qualified himself.

(Argument off the record.)

The Court: Overruled.
Mr. Hull: Exception.

A. From the past experience of the Wilcox sand, it has been producing over a period of seven to fifteen years.

By Mr. Twyford:

Q. How long would you then say the probable life of these wells in the Oklahoma City field would be?
A. Well, where they are drilling in from 100 to 150 feet of sand, it will more than likely be around an average of ten years.

Mr. Twyford: That is all.

Recross-examination.

By Mr. Hull:

Q. Mr. Hudspeth, that is purely a speculative matter, isn't it?
A. No, not from the other fields.
Q. It varies and depends entirely on the number of wells that are drilled into that sand, how close they are put together, how the gas pressure is reduced by the number of holes, and there are dozens of matters that enter into it [fol. 134] that make it purely speculative, aren't there?
A. You can put air on them and produce them for a long time.
Q. When did the discovery well come in? It was the 4th of December, 1928, wasn't it?
A. That wasn't in the Wilcox.
Q. I beg your pardon.
A. I say, that wasn't in the Wilcox.
Q. That is a well in this field, that is what he asked you?
A. That is a lime well.
Q. That well is practically dead today, isn't it?
A. The lime wells, are all short lived wells.
Q. That is practically dead today, isn't it?
A. I think so.

Mr. Hull: That is all.
Mr. Twyford: That is all.

(Witness excused.)

[fols. 135-143] OFFERS IN EVIDENCE

Ordinance No. 3944

An Ordinance Amending Chapter 22, Oklahoma City General Ordinances of 1928; Section 3 of Ordinance No. 3865, Subdivisions 6 and 7 of Section 4 of Ordinance No. 3615, and Section 1 of Chapter 7 Oklahoma City General Ordinances 1928, Relating to the Use of Property Within the City of Oklahoma City and Regulating the Drilling, Mining For or Putting Down Oil and/or Gas Wells, the Erection, Maintenance and Operation of all Structures, Machinery, Tanks or Equipment Used in Connection With Such Well Within the U-7 Use, or Oil and Gas District; and Repealing Section 9 of Ordinance No. 3774 and All of Ordinances Nos. 3883 and 3938; and Repealing All Ordinances or Parts of Ordinances in Conflict Herewith; and Providing a Penalty for the Violation Hereof

* * * * * * *

Section 2. That Section 3 of Ordinance No. 3865 of the City of Oklahoma City, be, and the same is hereby amended to read as follows:

A. It shall be unlawful and an offense for any person, firm or corporation to drill or put down any petroleum or gas well within the corporate limits of the City of Oklahoma City, except within the limits of the U-7 or Oil and Gas District, and unless permit therefor shall have been [fol. 144] first obtained.

* * * * * * *

Section 21. No permit for the drilling or putting down of any petroleum or natural gas well shall be issued to any person, firm or corporation, and no well for which permit has been heretofore issued, shall be drilled into any producing oil or gas horizon, until there shall be filed with the City Clerk of the City of Oklahoma City a good and sufficient bond covering each well for which permit is applied, and executed by some bonding or indemnity company authorized to do business in the State of Oklahoma, running in the

name of Oklahoma City and conditioned that the applicant will pay and discharge any liability imposed by law for damages on account of injury to property, either private or public, or bodily injury, including death, received or suffered by any person or persons, firm or corporation, and resulting from the drilling, operation or maintenance of any well or any structures, equipment, machinery, tanks, pipe lines or appurtenances thereto, and will abide by and comply with all the provisions of this ordinance; said bond shall be approved by the City Council. The maximum total liability, under said bond, for loss or damage, either to person or property shall be $200,000.00. Such bond shall be made for a period of not less than one year, and a new bond shall be furnished at the expiration of any existing one, if the operation of such well covered thereby is continued. If at the time of such renewal all drilling on such well has been completed, the amount of total liability, under such bond, may be reduced to $50,000.00. In case any bond required herein shall lapse or become void for any reason whatsoever, the permit issued under the terms of this ordinance shall immediately become inoperative and void until a new bond shall be provided and filed with the City Clerk or the existing bond reinstated in full force, and such well shall be shut down and all operations and production thereof suspended and discontinued until the filing of such new bond or reinstatement of such existing bond; [fol. 145] said renewal bond shall be approved by the City Council. The provisions of this section shall apply to all wells although permits have been previously issued therefor.

* * * * * * *

[fols. 146-158] Section 28. That any person, firm or corporation, either for himself or as agent, servant, or employe, who shall violate any provision of this ordinance or who shall be engaged in any work or the erection of any structures which shall be in violation of any provision of this ordinance, upon conviction shall be deemed guilty of an offense and fined in any sum not exceeding $19.00 and costs, and each day such violation is continued or any structure is maintained or permitted to exist in violation of this ordinance shall be deemed a separate offense.

Introduced and read in open meeting of the Council of the City of Oklahoma City on the 3rd day of June, 1930.

Passed by the Council of the City of Oklahoma City on the 3rd day of July, 1930.

Approved by the Mayor of the City of Oklahoma City on the 3rd day of July, 1930.

Walter C. Dean, Mayor.

Attest: M. Peshek, Jr., City Clerk.

Approved as to form this 3rd day of Ju-, *day of* ——, 1930.

[fol. 159] In District Court of Oklahoma County

[Title omitted]

Motion for New Trial—Filed Feb. 13, 1932

Comes now the plaintiffs, Walter H. Gant, Knox L. Garvin and A. D. Hudspeth, and move the court to vacate and set aside the judgment granting a permanent injunction rendered by this court on the 13th day of February, 1932, and to grant said plaintiffs a new trial for the following causes which affect materially the substantial rights of said plaintiffs.

One

Irregularity in the proceedings of the court, by which said plaintiffs were prevented from having a fair trial.

Two

Errors of law occurring at the trial and excepted to by said plaintiffs, because the judgment is contrary to law and to the evidence.

Three

Error of the court in sustaining defendants' demurrer [fols. 160 & 161] to plaintiffs' evidence, and in holding that the ordinance in question was valid and not unconstitutional and unreasonable and void.

Four

Error of the court in refusing to grant the plaintiffs the permanent injunction prayed for.

Five

Error of the court in granting to the defendants a permanent injunction.

Six

Error of the court in refusing to admit competent, relevant and material evidence offered by the plaintiffs, to which said plaintiffs excepted.

Twyford & Smith, Brown & Creed, Alan K. Swan,
Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 162] In District Court of Oklahoma County, State of Oklahoma

No. 65300

Walter H. Gant, Knox L. Garvin, and A. D. Hudspeth,
Plaintiffs,

vs.

The City of Oklahoma City, Oklahoma, a Municipal Corporation, and J. W. Van Meter, Defendants

Journal Entry of Judgment—Filed Feb. 13, 1932

Now on this 13th day of February, 1932, this action came on for trial on its merits on the issues joined wherein the plaintiffs seek a permanent injunction against the defendants and the defendants seek a permanent injunction against the plaintiffs and the plaintiffs appearing by their attorneys, Twyford & Smith, Brown & Cund and Allen K. Swann, and the defendants appearing by their attorneys,

W. H. Brown, and Harlan T. Deupree and A. L. Hull, both sides announcing ready for trial, thereupon. This being an equity case it was tried without a jury to the court, the parties having introduced all their evidence and stipulations and rested, the court finds the issues against the plaintiffs and denies plaintiffs any injunctive relief. The court finds from the evidence that the plaintiffs have failed to comply with the drilling ordinance of the City of Oklahoma City with reference to completing and operating the well [fol. 163] upon the premises described in the petition, in that the said plaintiffs have failed, refused and neglected to make a $200,000.00 surety bond and secure a drilling permit as required by the ordinance.

The court further finds that the provision of the ordinance requiring such surety bond. as a condition precedent to the issuance of a permit and the development of the property in question for oil and gas purposes, is reasonable, constitutional and valid, and for that reason finds that defendants are entitled to a permanent injunction against the plaintiffs, to which the plaintiffs except.

It is therefore considered, ordered, adjudged and decreed that the plaintiffs be and are hereby permanently enjoined from drilling, completing, equipping and operating an oil and gas well on Block 9, Meade Addition to Oklahoma City, Oklahoma, until such time as plaintiffs shall comply with the ordinance of said city with reference to making and filing surety bond and securing a permit, to which judgment plaintiffs except and exceptions are allowed.

Thereupon and thereafter the motion for new trial of the plaintiffs came on for argument and hearing before the court and the court having heard the arguments for and against the same, finds that the same should be overruled and is hereby overruled and denied, to which plaintiffs except. Thereupon the plaintiffs give notice in open court of their intention to appeal from this judgment to the Supreme Court of the State of Oklahoma, which notice is entered on the trial docket of said court, according to law, [fols. 164-171] by the Clerk of said Court. And thereupon the plaintiffs ask for and are allowed 15 days from this date in which to prepare and serve a case made for such appeal, and the defendants are allowed 3 days to suggest amend-

ments thereto, the same to be settled on 3 days notice, in writing.

Done in open court the date first above written.

Sam Hooker, Judge, District Court.

O. K.

Twyford and Smith, Attorneys for Plaintiffs.

O. K.

Harlan T. Deupree, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 171½] In Supreme Court of Oklahoma

23369

W. H. Gant et al., Plaintiffs in Error,

vs.

City of Oklahoma City et al., Defendants in Error

Judgment—June 21, 1932

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Andrews, J.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 172] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23369

WALTER H. GANT, KNOX L. GARVIN, and A. D. HUDSPETH, Plaintiffs in Error,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, and J. W. VanMeter, Superintendent of Buildings, Defendants in Error

Syllabus

1. The city of Oklahoma City has the power, under its zoning authority (Chapter 178, Session Laws 1923), to regulate and restrict the real estate within the city limits for the development and production of oil and gas therefrom.

2. Record examined and held: The judgment of the trial court is neither contrary to the law nor the evidence.

Error from the District Court of Oklahoma County, Oklahoma

Hon. Sam Hooker, Judge

Affirmed

Twyford & Smith, Brown & Cund, Allan K. Swan, for Plaintiffs in Error.

M. W. McKenzie, Municipal Counselor; A. L. Hull, Asst. Municipal Counselor, for Defendants in Error.

[fol. 173] OPINION—Filed June 21, 1932

ANDREWS, J.:

This is an appeal from a judgment of the district court of Oklahoma County in favor of the defendants in error, the defendants in the trial court, against the plaintiffs in error, the plaintiffs in the trial court. Hereinafter the parties will be referred to as they appeared in the trial court.

The plaintiffs instituted an action for the purpose of procuring a temporary and a permanent injunction against the defendants. The defendants sought a temporary and a permanent injunction against the plaintiffs. The trial court denied the prayer of the plaintiffs and granted a temporary injunction against them in favor of the defendants. From that judgment an appeal was taken to this court.

This court, in determining that appeal, in the case of Gant, et al. v. City of Oklahoma City, 150 Okla. 86, 6 Pac. (2d) 1065, affirmed the judgment of the trial court and said:

"We cannot see that the city ordinance, in requiring this $200,000 bond, is unreasonable, or unreasonable in requiring a surety known to be solvent and subject to regulation by our laws. The three judges below thought the regulations reasonable. Nothing has been shown indicating that the giving of this bond would in any manner interfere with the lawful rights of the plaintiffs below. It may be their misfortune that they do not get all they want, but the right of life and property, and to enjoy the gains of their own industry, is guaranteed to every person in the city of Oklahoma City by the state Constitution. Considering its size and cost, and considering the probable profits, it is not unreasonable as compared to the property of others endangered. As compared to the hazard to human life, it is a bagatelle."

The trial court denied the prayer of the plaintiffs and granted a permanent injunction against them in favor of the defendants. From that judgment the present appeal was taken to this court.

[fols. 174 & 175] The facts shown by the record in this case are substantially the same as those shown by the record on the former appeal. We think that it is neither necessary nor expedient to further discuss the issues presented by the record in this case or the contentions made by the plaintiffs in their briefs. The city of Oklahoma City has the power, under its zoning authority (Chapter 178, Session Laws 1923), to regulate and restrict the real estate within the city limits for trade, industry, residence, or other purpose. We have heretofore held that the ordinance attacked is a valid ordinance.

We find no error in the judgment of the trial court and it is in all things affirmed.

Riley, Hefner, Cullison, Swindall, McNeill and Kornegay, JJ., concur. Lester, C. J., and Clark, V. C. J., absent.

[fol. 176] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Nov. 9, 1932

To the Honorable Chief Justice of the Supreme Court of the State of Oklahoma and said Court:

Your petitioners, appellants above named, respectfully show that on the 21st day of June 1932, the Supreme Court of the State of Oklahoma rendered a judgment herein in favor of the defendants in error and against the plaintiffs in error in which said judgment and proceedings had prior thereto in this cause certain errors were committed, to the prejudice of these petitioners, all of which more in detail appear in the assignments of error filed with this petition.

That after the rendition of said judgment and on the 16th day of July, 1932, your petitioners filed a petition for re-hearing; that thereafter on the 1st day of November, 1932, an order was made by this court denying said petition for rehearing. Thereupon an opinion was filed in this cause by this court, affirming the judgment of the District Court of Oklahoma County, Oklahoma, which opinion is a part of the record in this cause.

And your petitioners, the plaintiffs below, respectfully show that there was a judgment in said cause in the District Court of Oklahoma County, State of Oklahoma, in [fol. 177] favor of the defendants in error and against your petitioners restraining and enjoining, by permanent injunction, them from using certain property and real estate and from drilling an oil and/or gas well thereon without first complying with certain void and unconstitutional ordinances of the City of Oklahoma City, which said judgment, upon appeal to the Supreme Court of the State of Oklahoma, was affirmed by said court.

And your petitioners further respectfully show that said Supreme Court of the State of Oklahoma is the highest court of the state of Oklahoma in which a decision in said cause could be had; and your petitioners claim the right

to remove said cause to the Supreme Court of the United States of America by appeal under the statutes of the United States authorizing an appeal from state courts, in as much as in said judgment of the Supreme Court of the state of Oklahoma, and the proceedings in said cause, certain errors were committed to the prejudice of your petitioners, all of which will more in detail appear from the assignments of error which are filed with this petition.

And because your petitioners claimed in said cause that the Supreme Court of the state of Oklahoma erred in holding that the trial court did not commit error in enjoining and restraining by permanent injunction the petitioners from using their property for development for oil and gas and minerals, which injunction was based upon an unreasonable, arbitrary, capricious, unconstitutional and void ordinance of the City of Oklahoma City, which ordinance violates Section 1 Article 14 of the Constitution of the United States as applied to these petitioners and their property in that it abridges priveleges and immunities of citizens of the United States and deprives the petitioners of their property without due process of law and denies to them the equal protection of the laws in that said ordinance and the enforcement thereof by said City, and its officers, required the owner or owners of property, as a condition precedent to the use of their private property and real estate, under the guise of Zoning Ordinances, to make and file with the City a $200,000.00 Surety Bond to be executed only by a paid surety company authorized to do business in the state for the use of said property for lawful purposes in that certain other and additional restrictions upon the use of said private property were contained in [fol. 178] said ordinance, all of which violated the constitutional rights of petitioners, as will more fully appear in the assignments of error which are filed herewith.

And because your petitioners claimed in said cause that the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County, Oklahoma and in sustaining and holding valid the ordinances of the said City complained of and in sustaining and holding that said ordinances were reasonable and not unreasonable as applied to the property of the petitioners, all of which judgment of the District Court and judgment of the Supreme Court and opinion thereon, is erroneous

and violates the rights of these petitioners under the Constitution of the United States in that the same violated their rights as fixed and guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Wherefore your petitioners claim and say that by a final judgment in a suit in the highest court of the state of Oklahoma in which a decision in said cause could be had, there was drawn in question the validity of a statute and ordinance of the state of Oklahoma and the City of Oklahoma City on the ground of its being repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision of said court was in favor of its validity. And wherefore, in accordance with the statutes in such cases made and provided, your petitioners pray that an appeal be allowed to the Supreme Court of the United States for the correction of errors, an assignment whereof is filed with this petition, and that a transcript of the record, proceedings, files and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States. And your petitioners pray for the allowance of a citation in due form of law, and for the stay of the effect of the judgment in the Supreme Court of the State of Oklahoma pending the appeal to and determination by the Supreme Court of the United States, and your petitioners will ever pray.

James S. Twyford, Solon W. Smith, Allan K. Swan, R. H. Brown, C. D. Cund, J. H. Everest, Attorneys for Petitioners.

[fol. 179] Let the appeal be allowed. And the mandate is hereby stayed on the present bond of Fifty Thousand ($50,000.00) Dollars filed herein until December 15th, 1932, which is for the purpose of filing the appeal in the Supreme Court of the United States, and upon the filing of same therein mandate is hereby stayed pending final determination therein.

Dated this 9th day of November, 1932.

E. F. Lester, Chief Justice of the Supreme Court of the State of Oklahoma. (Seal Supreme Court, State of Oklahoma.)

Attest:

Gus Pool, Clerk of the Supreme Court of the State of Oklahoma.

[fol. 180] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 9, 1932

Come now Walter H. Gant, Knox L. Garvin and A. D. Hudspeth, appellants in the above entitled cause, and respectfully show that in the trial of said cause and in the rendition of the judgment in the trial court and in the opinion and judgment of the Supreme Court of the State of Oklahoma in said cause, manifest errors were committed to their prejudice, which are apparent from the record therein; that the errors committed by the trial court and affirmed by the Supreme Court of the State and committed by the Supreme Court of the State in its opinion and judgment in said cause, are more fully and particularly set forth as follows:

I

The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County, State of Oklahoma.

II

The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the District Court of Oklahoma County, State of Oklahoma.

III

The Supreme Court of the State of Oklahoma erred in holding that the Zoning Ordinance of the City of Oklahoma City, requiring the giving of a $200,000.00 Surety Bond [fols. 181-187] conditioned that the appellants would pay any and all damages accruing to any and all persons arising by operation of law in connection with the drilling of an oil and/or gas well upon the leasehold estate and property of the appellants was reasonable and valid, and erred in not holding that the same was unreasonable and invalid and contrary to the constitutional rights of these appel-

lants as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States in that said ordinance, and the enforcement thereof, and the judgment restraining and permanently injoining and preventing the appellants from using and developing their property is and was the taking of property without due process of law, and denial of the equal protection of the laws and deprives them of their property in the use thereof for lawful purposes.

IV

The Supreme Court of the State of Oklahoma erred in holding that the State of Oklahoma, and its municipal subdivisions, had the right, by a zoning ordinance or statute, to require any bond at all to guarantee the payment of a private obligation that might arise in the future between citizens of the United States, and erred particularly in holding that if a bond could be required that the only kind of a bond that would be accepted and sufficient would be one signed by a third party to-wit; a Surety Company authorized to do business in the state, over whom the owner of said property has or had no control, and in refusing to accept a bond signed by good and sufficient sureties, if any bond at all could be required, all of which holdings and all of which provisions making said requirements contained in said ordinance, were violative of the constitutional rights of appellants as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, which constitutional question was raised from the inception of the case to the present time.

For which errors the said Walter H. Gant, Knox L. Garvin and A. D. Hudspeth pray that the said judgment of the Supreme Court of the State of Oklahoma and of the District Court of Oklahoma County, State of Oklahoma be reversed and judgment rendered in favor of the appellants; and for such other and further relief as to the court may seem just and proper, and for all costs.

James S. Twyford, Solon W. Smith, Allan K. Swan, R. B. Brown, C. D. Cund, J. H. Everest, Attorneys for Appellants.

[fol. 188] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANTS RELY AND PARTS OF RECORD TO BE PRINTED IN SUPPORT THEREOF—Filed Dec. 13, 1932

Come now appellants and respectfully designate the following points upon which they rely and the parts of the record to be printed in support thereof, to-wit:

Points Upon Which They Rely

Appellants claim and aver that that part of the Zoning Ordinance of the City of Oklahoma City, known as Ordinance #3944, is unreasonable, discriminatory, unconstitutional and void as applied to the property of the appellants, and the facts as shown in the record. The same being violative of the Fourteenth Amendment to the Constitution of the United States, and is and was, in its operation, the taking of property without due process of law, a denial of the equal protection of the laws, and the enforcement thereof as against the property of the appellants and deprives them of their property and the use thereof for lawful purposes contrary to the Constitution of the United States, and that the City had no statutory authority to enact and enforce the same, which section of said ordinance reads as follows, to-wit:

"No permit for the drilling or putting down of any petroleum or natural gas well shall be issued to any person, firm or corporation, and no well for which permit has been heretofore issued, shall be drilled into any producing oil or gas horizon, until there shall be filed with the City Clerk of the City of Oklahoma City a good and sufficient bond covering [fol. 189] each well for which permit is applied, and executed by some bonding or indemnity company authorized to do business in the State of Oklahoma, running in the name of Oklahoma City and conditioned that the applicant will pay and discharge any liability imposed by law for damages on account of injury to property, either private or public, or bodily injury, including death, received or suffered by any person or persons, firm or corporation, and resulting from the drilling, operation or maintenance of any well or any structures, equipment, machinery, tanks, pipelines or appurtenances thereto, and will abide by and comply with all the provisions of this ordinance; said bond shall be approved

by the city Council. The maximum total liability, under said bond, for loss or damage either to person or property shall be $200,000.00. Such bond shall be made for a period of not less than one year, and a new bond shall be furnished at the expiration of any existing one, if the operation of such well covered thereby is continued. If at the time of such renewal all drilling on such well has been completed, the amount of total liability, under such bond, may be reduced to $50,000.00. In case any bond required herein shall lapse or become void for any reason whatsoever, the permit issued under the terms of this ordinance shall immediately become inoperative and void until a new bond shall be provided and filed with the City Clerk or the existing bond reinstated in full force, and such well shall be shut down and all operations and production thereof suspended and discontinued until the filing of such new bond or reinstatement of such existing bond; said renewal bond shall be approved by the City Council. The provisions of this section shall apply to all wells although permits have been previously issued therefor."

Parts of Record to be Printed at Request of Appellants

Come now the appellants and request the following parts of the record in support of the points upon which they rely as follows, to-wit:

1. Petition (omitting caption) (R. pages 7-11).
2. Answer and Cross-petition (omitting caption and verification) (R. pages 15-19).
3. Evidence of witness, James Lemen (omitting any remarks of counsel and objections and rulings if desired by clerk.) (Omit exhibits). (R. pages 28-62.)
4. Evidence of Thomas C. Vaughn (R. pages 63 to 71). With same omissions as above. (Omit exhibits.)
5. Evidence of Charles K. Scruggs (R. pages 71 to 77). (Omit exhibits.)

[fols. 190 & 191] 6. Evidence of A. D. Hudspeth (R. pages 78 to 86). Same omissions as above. (Omit exhibits.) Recalled: (R. pages 133 to 134.)

7. Evidence of Knox L. Garvin (R. pages 87 to 96). Omissions as above. (Omit exhibits.)
8. Evidence of Walter H. Gant (R. pages 107 to 115). (Omissions as above.) (Omit exhibits.)
9. Evidence of Otto Bradford (R. pages 116 to 123). Omissions as above. (Omit exhibits.)

10. Evidence of H. H. Wegener (R. pages 124 to 128). Omissions as above. (Omit exhibits.)

11. Evidence of M. P. Smith (R. pages 128 to 133). Omissions as above. (Omit exhibits.)

Section 21 of Ordinance No. 3944 appearing at pages 144 to 145 of the record, Section 2-A Record Page 135 and Section 28 of said Ordinance appearing at page 146 of the record.

Order of Injunction of the trial court (omitting caption) (R. pages 162 to 164).

Motion for New trial (omitting caption) (R. pages 159 to 160).

Journal Entry of Judgment affirming case (R. 171½).

Opinion of Supreme Court affirming judgment of trial court (omitting caption) (R. pages 172 to 174).

Petition for Appeal (omitting caption) (R. pages 176 to 178).

Order Allowing Appeal (R. page 179).

Assignment of Errors (omitting caption) (R. pages 180 to 181).

Witness our hands this 26th day of November, 1932.

James S. Twyford, Solon W. Smith, Allan K. Swan, R. B. Brown, C. D. Cund, J. H. Everest, Attorneys for Appellants.

We the undersigned attorneys for the defendant, The City of Oklahoma City, and J. W. VanMeter, hereby accept service of the above and foregoing statement of points and parts of record to be printed and designated by the appellants this 26th day of November, 1932.

W. H. Brown, Municipal Counselor, and Harlan T. Denfree, Asst. Municipal Counselor, Attorneys for Appellees, City of Oklahoma City and J. W. Van Meter.

[fol. 192] [File endorsement omitted.]

Endorsed on cover: File No. 37,244. Oklahoma Supreme Court. Term No. 547. Walter H. Gant, Knox L. Garvin, and A. D. Hudspeth, appellants, vs. The City of Oklahoma City and J. W. VanMeter, Superintendent of Buildings. Filed December 10, 1932. File No. 37,244.

NO. 547

In the Supreme Court of the United States

October 1932 Term

WALTER H. GANT, KNOX L. GARVIN,
and A. D. HUDSPETH,
Appellants,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation,
and J. W. VANMETER,
Appellees.

STATEMENT SHOWING JURISDICTION OF SUPREME COURT TO REVIEW DECISION OF THE SUPREME COURT OF OKLAHOMA.

Come now the appellants and in compliance with Rule 12 of the Supreme Court of the United States, state and show that this Honorable Court has jurisdiction to review the decision of the Supreme Court of the State of Oklahoma on the following grounds, to-wit:

A. This court has jurisdiction to review the decision of the highest court of the State of Oklahoma, to-wit: the Supreme Court of that state, pursuant to Section 237 of the Act of Congress of February 13, 1925, entitled:

> "An Act to Amend the Judicial Code, and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes,"

which section reads as follows, to-wit:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constituion, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."
>
> Judicial Code, Section 237, as amended; 43 Stat. 937; 28 U. S. C. A., Section 344.

B. The judgment of the Supreme Court of the State of Oklahoma herein complained of was rendered, affirming the judgment of the trial court, on June 21, 1932. The order and judgment denying a petition for rehearing and making said judgment final, was rendered by the Supreme Court of said State on November 1st, 1932. The same appear at pages 172 and 176 of the record.

The application and petition for appeal was presented to the Supreme Court of the State of Oklahoma and allowed on Nov. 9th, 1932. The same appear at pages 176 to 179 of the record.

C. The nature of the case is as follows, to-wit:

Appellants claim and aver that that part of the Zoning Ordinance of the City of Oklahoma City, known as Ordinance No. 3944, (Record page 135) is unreasonable, discriminatory, unconstitutional and void as applied to the property of the appellants, and the facts as shown in the record. The same being violative of the Fourteenth Amendment of the Constitution of the United States, and is and was, in its operation, the taking of property without due process of law, a denial of the equal protection of the laws, and the enforcement thereof as against the property of the appellants and deprive them of their property and the use thereof for lawful purposes contrary to the Constitution of the United States, and that the city had no statutory authority to enact and enforce the same, which section of said ordinance reads as follows, to-wit:

> "No permit for the drilling or putting down of any petroleum or natural gas well shall be issued to any person, firm or corporation, and no well for which permit has been heretofore issued, shall be drilled into any producing oil or gas horizon, until there shall be filed with the City Clerk of the City of Oklahoma City a good and sufficient bond covering each well for which permit is applied, and executed by some bonding or indemnity company authorized to do business in the State of Oklahoma, running in the name of Oklahoma City and conditioned that the applicant will pay and discharge any liability imposed by law for damages on account of injury to property, either private or public, or bodily injury, including death,

received or suffered by any person or persons, firm or corporation, and resulting from the drilling, operation or maintenance of any well or any structures, equipment, machinery, tanks, pipelines or appurtenances thereto, and will abide by and comply with all the provisions of this ordinance; said bond shall be approved by the City Council. The maximum total liability, under said bond, for loss or damage either to person or property shall be $200,000.00. Such bond shall be made for a period of not less than one year, and a new bond shall be furnished at the expiration of any existing one, if the operation of such well covered thereby is continued. If at the time of such renewal all drilling on such well has been completed, the amount of total liability, under such bond, may be reduced to $50,000.00. In case any bond required herein shall lapse or become void for any reason whatsoever, the permit issued under the terms of this ordinance shall immediately become inoperative and void until a new bond shall be provided and filed with the City Clerk or the existing bond reinstated in full force, and such well shall be shut down and all operations and production thereof suspended and discontinued until the filing of such new bond or reinstatement of such existing bond; said renewal bond shall be approved by the City Council. The provisions of this section shall apply to all wells although permits have been previously issued therefor."

(Record page 144).

This ordinance was passed and enforced pursuant to Chapter 178, Session Laws of Oklahoma, 1923, entitled:

"An Act relating to the powers of cities, with respect to buildings, sites, areas, trades and industries; authorizing the creation of zoning districts, and declaring an emergency."

Section 1 of said statute reads as follows, to-wit:

> "Section 1. For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Section 21 of Ordinance 3944 appears at pages 135 to 141 of the record.

The ruling of the trial court was that the ordinance and statute pursuant to which the ordinance was passed, were valid and constitutional and the ruling and decision of the Supreme Court of the State were that the ordinance and statute pursuant to which the ordinance was passed and enforced, were both constitutional and valid, and that the same did not violate any constitutional rights of the appellants guaranteed to them by the Fourteenth Amendment of the Constitution of the United States and was not unreasonable in terms or in its operation. In other words, the validity of the statute and ordinance were sustained by both the District Court of the State and the Supreme Court of the State. It is claimed that this court has jurisdiction to review the decision and ruling of the Supreme Court of the State, being the highest court of the State of Oklahoma, in its holding that the provision of the ordinance com-

plained of the statute of the state, pursuant to which the ordinance was passed and enforced were constitutional and valid and did not interfere with the property or personal rights of the appellants.

And to review said Judgment which granted a permanent injunction against appellants from using their said property for said lawful purpose, without first meeting the said void and unconstitutional requirements of said ordinance.

The decision of the Supreme Court of Oklahoma now appealed from, to wit:

> *Walter H. Gant et al* v. *The City of Oklahoma City*, 15 Pac. (2d) 833. (Record 172). Is not yet officially reported.

It is claimed that this statute and ordinance violate the rights of the appellants as guaranteed by the following provision of the Constitution of the United States as follows, to-wit:

> "Section 1, Article 14 of the Constitution of the United States, among other things, provides:
>
> " 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

D. The following authorities are believed to sustain the jurisdiction of the Supreme Court of the United States

to review the decision of the Supreme Court of Oklahoma involving this constitutional question, namely:

Dobbins v. *Los Angeles*, 25 Sup. Ct. Rep. 18, 195 U. S. 223, 47 L. ed. 119.

Lawton v. *Steele*, 152 U. S. 133-137, 38 L. ed. 385-388, 14 Sup. Ct. Rep. 499-501.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Reagan v. *Trust Co.* 154 U. S. 362, 397, 399, 410, 412, 14 Sup. Ct. Rep. 1047.

Holden v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Pennsylvania Coal Co. v. *Mahon et al.*, 43 Sup. Ct. Rep. 158, 260 U. S. 393, 67 L. ed. 322.

Nectow v. *City of Cambridge et al.*, 277 U. S. 183, 72 L. ed. 842, 48 Sup. Ct. Rep. 447.

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 47 Sup. Ct. 114, 71 L. ed. 303, 54 A. L. R. 1016.

State of Washington ex rel., Seattle Trust Company v. *Roberge*, 278 U. S. 116, 73 L. ed. 210.

In the case previously before this court between the same parties the appeal was dismissed for want of Jurisdiction because only a temporary injunction had been granted *Gant et al* v. *City*, 76 L. ed. 266, No. 449, October 1931 term. However in the present appeal a permanent injunction, which is a final Judgment, was granted.

Wherefore, it is respectfully submitted that this court has jurisdiction of this appeal in that it involves a single

question, to-wit the constitutionality of the statute and ordinance of the State of Oklahoma, the same having been held valid and sustained in a final decision by the highest court of that state.

Respectfully submitted,

JAMES S. TWYFORD,
Oklahoma City, Oklahoma,

SOLON W. SMITH,
Oklahoma City, Oklahoma,

ALLEN K. SWANN,
Tulsa, Oklahoma,

R. B. BROWN,
Duncan, Oklahoma,

C. D. CUND,
Duncan, Oklahoma,

J. H. EVEREST,
Oklahoma City, Oklahoma.
Attorneys for Appellants.

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NO. 547

In the Supreme Court of the United States

October 1932 Term

WALTER H. GANT, KNOX L. GARVIN,
and A. D. HUDSPETH,
Appellants,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation
and J. W. VANMETER,
Appellees.

BRIEF OF APPELLANTS

Appellants claim that that part of the Zoning Ordinance of the City of Oklahoma City, known as Ordinance No. 3944, is unreasonable, discriminatory, unconstitutional and void as applied to the property of the appellants, and the facts as shown in the record. The same being violative of the Fourteenth Amendment to the Constitution of the United States, and is in its operation, the taking of property without due process of law, a denial of the equal protection of the laws, and the enforcement thereof as against the property of the appellants and deprives them of their property and the use thereof, for lawful purposes, con-

trary to the Constitution of the United States, and that the City had no statutory authority to enact and enforce the same, which section of said ordinance reads as follows, to-wit:

> "No permit for the drilling or putting down of any petroleum or natural gas well shall be issued to any person, firm or corporation, and no well for which permit has been heretofore issued, shall be drilled into any producing oil or gas horizon, until there shall be filed with the City Clerk of the City of Oklahoma City a good and sufficient bond covering each well for which permit is applied, and executed by some bonding or indemnity company authorized to do business in the State of Oklahoma, running in the name of Oklahoma City and conditioned that the applicant will pay and discharge any liability imposed by law for damages on account of injury to property, either private or public, or bodily injury, including death, received or suffered by any person or persons, firm or corporation, and resulting from the drilling, operation or maintenance of any well or any structures, equipment, machinery tanks, pipelines or appurtenances thereto, and will abide by and comply with all the provisions of this ordinance; said bond shall be approved by the City Council. The maximum total liability, under said bond, for loss or damage either to person or property shall be $200,000.00. Such bond shall be made for a period of not less than one year, and a new bond shall be furnished at the expiration of an existing one, if the operation of such well covered thereby is continued. If at the time of such renewal all drilling on such well has been completed, the amount of total liability, under such may be reduced to $50,000.00. In the case any bond required herein shall lapse or become void for any reason whatsoever, the permit issued under the terms of this

ordinance shall immediately become inoperative and void until a new bond shall be provided and filed with the City Clerk or the existing bond reinstated in full force, and such well shall be shut down and all operations and production thereof suspended and discontinued until the filing of such new bond or reinstatement of such existing bond; said renewal bond shall be approved by the City Council. The provisions of this section shall apply to all wells although permits have been previously issued therefor."

This action was instituted in the District Court of Oklahoma County, Oklahoma, on the 2nd day of October, 1930, by the appellants, against the appellees, the City of Oklahoma City, Oklahoma, a municipal corporation, and J. W. VanMeter. The object of the appellants in filing the suit was to enjoin the city from interfering with the appellants in the drilling of a well for oil and/or gas on block number nine (9), Meads Addition to Oklahoma City, Oklahoma.

ABSTRACT OF PLEADINGS

The appellants' petition sets forth that appellants are the owners of a valid oil and gas mining lease on block 9, Meads Addition to Oklahoma City, Oklahoma; that said lease provided, among other things, that the lessee named therein should commence the drilling of a well upon said premises for oil and/or gas within a certain length of time, and that the time within which said well was to be

commenced had not expired. Appellants further allege that in order to carry out the terms of said lease they had entered into a contract with one M. T. Smith, a drilling contractor, to go upon said premises and drill a well for oil and/or gas, and that pursuant to said contract said drilling contractor had proceeded to move machinery and equipment upon said premises and had commenced the drilling of a well thereon, which, at the time of the filing of said petition, had been drilled to a depth of 2,700 feet.

Appellants further alleged that before entering upon said premises by their said contractor for the purpose of drilling said well they had complied with all the valid ordinances of the appellee, city, regulating the exploration of said premises for oil and gas, and had complied with all the valid rules, regulations and ordinances of said appellee, city, prerequisite to the procuring of a permit from said appellee for the drilling of said well, and that the board of adjustment of said appellee had entered its order granting the said appellants a permit to drill said well. Appellants further alleged that said appellees were threatening to interfere with appellants and appellants' contractor in the drilling of said well by wrongfully requiring the appellants to execute and file with the appellees a bond in the penal sum of $200,000 signed by some surety company as surety, payable to said appellee, city, conditioned as provided by the said ordinances of said city. Appellants al-

leged that said requirements of said bond is based upon oppresssive, unreasonable, unconstitutional and void ordinances. Appellants further alleged that the property upon which they were drilling said well was far removed from residences, homes, or buildings, and that said property had been used for a period of more than twenty years as a city dump ground, and that there were wells drilled and being drilled in close proximity to said property, which, when completed as producers of oil and/or gas would drain appellants' property of the oil and gas underlying the same. Appellants further alleged that they acquired their interest in said property prior to the time that said appellees attempted to adopt such oppressive, unreasonable and void ordinances. Appellants alleged that the demand of said city for such bond was unreasonable and unconstitutional, and if enforced would have the effect of depriving these appellants of valid property rights without due process of law; that surety companies authorized to transact business within the State of Oklahoma, before they would execute such a bond for these appellants, would make certain demands with which the appellants were unable to comply.

Appellants further alleged that they offered to make and were at said time ready, willing and able to make and file with said appellee, city, a bond conditioned as required by said ordinances with good and sufficient per-

sonal sureties thereon, but that said appellee refused to accept such a bond.

Appellants further alleged that said appellees unless enjoined and restrained, would forcibly stop said appellants and their contractors from drilling said well, for which action said appellants would have no adequate remedy at law. The appellants prayed for a temporary restraining order and a temporary injunction, and that upon final hearing thereof, said injunction be made permanent.

By way of cross-petition the appellees alleged that the appellants made an application through the buliding commissioner for a permit to drill a well upon the premises involved herein, and that such application was denied, and that appeal was prosecuted by appellants to the board of adjustment of Oklahoma City, Oklahoma, that said appeal was heard September 15th., and an order entered by the board of adjustment granting to the appellants the right to obtain a permit for the drilling of said well provided that the appellants should comply with all ordinances and regulations of said city then in force or thereafter put in force relative to drilling, operating and maintaining a well upon said property, attaching to their answer a copy of the order of the board of adjustments.

Appellees further state that after the granting of said order the appellants went upon said property without ob-

taining a permit and without complying with the ordinances of the city, as hereinafter set out, and commenced the drilling of a well. The appellees alleged that the appellants failed to execute a bond in the sum of $200,000, as required by the city ordinances, conditioned that the appellants would pay and discharge any liability imposed by law for damages on account of injury to property, either public or private, or bodily injury, including death, received or suffered by any person or persons, firm or corporation, resulting from the drilling, operation or maintenance of said well. Appellees pray that the court restrain the appellants, their servants, agents and employees, from drilling or continuing the drilling of said well upon said property until said appellants have complied with the ordinances of said city and obtained the permit and executed the bond as required by said ordinances, and that upon a final hearing the temporary order be made permanent.

ABSTRACT OF EVIDENCE

The appellants called as their first witness, James Lemen. He testified that he was a civil engineer by profession; that he had visited block 9, Meads Addition to Oklahoma City, Oklahoma; had surveyed the same and made a plat thereof, and that the location of the well thereon was approximately one-half mile from the nearest

business building, and that the house to the location was approximately 100 yards closer than this; the nearest building he found was a railroad building about three hundred yards from the site; that the river was south from the well, and between the well and the river was waste land that had been used for a dump ground. He testified that north of the well and about seven hundred and fifty feet from it was a railroad track, and in an easterly direction up the track, perhaps one hundred yards, was a water tank, and that west of the well there were no residences or habitation closer than half a mile, and that between the well and residences, west of it was waste land and dump grounds. He identified the plat which appears at page 43 of the case-made. He testified that the Mead well was all of a mile from the City Hall in Oklahoma City, and that between the well and the City Hall on an air line was a considerable business district.

CHARLES K. SCRUGGS testified that he was in the insurance and bond business, representing the Detroit Fidelity & Insurance Company, and the Metropolitan Casualty Insurance Company; that he was familiar with the $200,000 bonds required by the city, and that his company was authorized to do business within the State of Oklahoma, and could execute such a bond as sureties if they desired to do so, but before they would execute such a bond for an independent contractor, they would require the independent

contractor to deposit with the surety company cash or collateral to the full amount of the bond, or require such a financial statement that the company would be amply protected, and that the financial statement would have to show a net worth in the applicant of the bond of at least a million dollars (Printed Record Page 35); that all surety companies operating in this state made practically the same requirements before they would execute such a bond.

A. D. HUDSPETH testified that he was familiar with block 9 where the well in question was being drilled, and that there was a well producing 610 feet southeast of the well in question, purported to be making at least 86,000 barrels of oil per day, and that it belonged to T .B. Slick, and caused no trouble when it was drilled in; that the Skelly-Hurt well was 800 feet south and 100 feet east of the location in question and was reported to be making at least 80,000 barrels of oil per day, and that the city owns the property immediately south of the block 9 location and across Reno Avenue from it, and that there are three locations on the city property. That the location in block 9 is right in the middle of the dump grounds, and that in order to make said location he had to hire three different crews to clean the garbage and refuse from said tract (Printed Record, Page 40); that he was a practical engineer and was familiar with machinery and equipment used in the Oklahoma City field, and that there was no hazard and

would be no hazard in bringing in a well on said block. He testified on cross-examination that sand, if the wells were permitted to stand open long enough, would cut out the threads, but that there were always two gates on the well and that either one of them could be closed; that the modern equipment and appliances were not used on the Mary Sudik and Sigmon wells which got beyond control. (Printed Record, Page 46).

KNOX GARVIN testified that he was one of the appellants and knew where the present location was; that there were no residences in a quarter of a mile of it, but that there was a dump ground northwest, south and southwest of it, and immediately east and southeast there is the oil field outside the city limits; that he had been engaged in the oil business for twelve or fifteen years and had had considerable experience in drilling wells; that there was no hazard in completing one of these wells in the Oklahoma City field where the proper equipment was used. (Printed Record, Page 47.) He explained then to the court the equipment that should be used in completing one of these wells. (Printed Record, Page 49).

He testified that he learned that before they would be able to make a $200,000 surety bond that he would have to put up collateral surety with the company signing the bond as surety the amount of $250,000. (Printed Record, Page 53). That the surety companies charge a pre-

mium of $2,000 a year for each bond; that he wanted to make a personal bond, but was informed that the city could not accept it (Printed Record, Page 53); that the city charged a fee of $1,000 for a permit; that a certified check for this amount had been deposited with the city (Printed Record, Page 54).

WALTER GANT testified that he was one of the appellants and lived in Oklahoma City and was familiar with the Oklahoma City oil field; that he had been in the oil business since 1914; that he had assisted in drilling about 39 wells in the Oklahoma City field; that he was familiar with the location of the well in question, and that there was no more hazard connected with the drilling and completion of this well than there would be in the drilling of any other oil well; that he had never experienced any trouble with the drilling in of any of the wells in the Oklahoma City field, and that none of them had done any damage; that he and Mr. Garvin carried compensation insurance as well as public liability insurance; that they had applied for a permit to drill this well and had put up the $1,000 fee, and had complied with all the requirements of the city prerequisite to securing the permit except the giving of the $200,000 bond.

OTTO BRADFORD testified that he was general umpire of the Oklahoma City field, having supervision of the drilling in, opening and shutting in of the wells and had been such

ever since the commencement of the Oklahoma City field; that he knew where the location on block 9, Meads Addition was, and was familiar with the surrounding territory, and that there would be very little hazard in the drilling of a well for oil or gas there; that since the improvement of modern equipment and appliances there had been no well to get loose in the Oklahoma City field. (Printed Record, Page 68).

H. H. WEGENER testified he had been a drilling contractor for twelve years and was familiar with the Oklahoma City field and had done a lot of drilling in that field; that he had not had any trouble in bringing in a well in the Oklahoma City field; that he was familiar with block 9, or the "Hog Pen" location, as they called it, and knew it was a dumping ground full of tin cans and refuse unfit for human habitation, and that the drilling of a well at this location would not be hazardous to the surrounding property or people; (Printed Record, Page 74), that he had completed four wells in the Oklahoma City field; that by the use of modern equipment on any of these wells they could not get beyond control. (Printed Record, Page 75).

M. T. SMITH testified that he was a drilling contractor and was drilling a well on block 9, Meads Addition; that he had been drilling contractor for about thirty years and

had drilled oil wells before the Oklahoma City field was ever heard of, and that the two wells he is now drilling would make fourteen he had drilled in the Oklahoma City field; that he was familiar with the bringing in of oil and gas wells, both in the Oklahoma City field and other fields; that he was familiar with the conditions surrounding Block 9, Meads Addition, and that he did not consider the bringing in of a well there or operating of a well there hazardous to surrounding property. (Printed Record, Page 77). That he had never had any trouble with any well he had drilled in the Oklahoma City field; that he used the modern equipment in the bringing in of the wells.

Hudspeth being recalled, testified the probably life of the wells in the Oklahoma City fields was from seven to fifteen years.

The witness Knox L. Garvin testified, in addition to the above statement, that he had made application for a permit to the Board of Adjustment and had complied with all of the requirements of the ordinance, and of the Board, except as to the matter of posting the surety bond required.

He further testified that in the U-7 or drilling zone within the city limits there were approximately twelve to fifteen hundred acres; that of that area probably fifty percent is settled up with residences and some business and industries. (Printed Record, Page 56).

It was further shown by the testimony of this witness that in his offer to post a personal bond, no principal sum of such bond was discussed, nor was a definite bond tendered (Printed Record, Page 54), and that the reason the surety bond required by the ordinance was not posted was because of his inability to meet the requirements of the surety company (Printed Record, Page 59). That the ordinance operated to his detriment because of his inability to qualify so a surety company would execute his bond. (Printed Record, Page 59).

The ordinance referred to further provides:

> "A. It shall be unlawful and an offense for any person, firm or corporation to drill or put down any petroleum or gas well within the corporate limits of the City of Oklahoma City, except within the limits of the U-7 or Oil and Gas District, and unless permit therefor shall have been first obtained. (Printed Record, Page 81).

The trial court granted permanent injunction in favor of defendant, City, on its cross-petition and against the appellants, injoining them from operating or completing the well in question until or unless they first made and executed the surety bond required by the ordinance. The judgment of the trial court was affirmed on appeal by the Supreme Court of Oklahoma. The opinion of affirmance is reported as *Walter H. Gant et al.*, vs. *The City of Oklahoma City*, 15 Pac. (2d) 833. A copy of the opinion is found in the printed record at page 87.

SPECIFICATION OF ASSIGNED ERRORS URGED ON APPEAL

The assignment of errors appear at pages 92 of the printed record. We intend to urge assignments of error one, two three and four which embrace the proposition that the Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court granting a permanent injunction, said judgment being based on the finding and holding that the provision of the ordinance of the City of Oklahoma City requiring the giving of a $200,000.00 bond signed by a surety company authorized to do business in the State of Oklahoma was and is constitutional and valid, while it is the contention of the appellant that the same is unconstitutional and void, and should have been so declared by that Court.

For convenience the assignments will be argued as one question, as the same presents a question of law, the facts in the case not being in dispute. The question will be argued under the following proposition, to-wit:

PROPOSITION NO. ONE

Section No. 21 of Ordinance No. 3944 of the defendant City of Oklahoma City, Oklahoma, violates Section 1, Article 14, of the Constitution of the United States, Section 2, Article 2, of the Constitution of the State of Oklahoma, and Section 7, Article 2, of the Constitution of the State of Oklahoma, and is, therefore, void.

In 1923, the Legislature of the State of Oklahoma adopted an act which is Chapter 178 of the 1923 Session Laws, which, among other things, reads as follows, to-wit:

> "For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of states and corporate villages is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Acting under this delegated authority from the State, the city adopted the ordinance in question, Section 21 of which is quoted in full above.

The same requires the giving of a $200,000 surety bond as a condition precedent to the issuance if a permit to develop one's property for oil and gas purposes within the City limits.

Section 1, Article 14 of the Constitution of the United States, among other things, provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Section 2, Article 2 of the Constitution of the State of Oklahoma provides:

"All persons have the inherent right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry."

Section 7, Article 2 of the Constitution of the State of Oklahoma provides:

"No person shall be deprived of life, liberty or property without due process of law."

Conceding, for the sake of this argument, that the city was authorized by the Act of the Legislature above mentioned, to adopt ordinances having for their purposes the accomplishment of the objects set out in the Act of the Legislature, then it is our contention that such ordinances, rules or regulations, in order to be valid and constitutional, would have to be reasonable, and that the question of their reasonableness or unreasonableness is for the courts to determine.

Upon the right of the courts to pass upon the reasonableness or unreasonableness of the ordinances adopted by the city in the exercise of its police power, we desire to make the following observations, to-wit:

The Supreme Court of the United States, in the case of *Dobbins* v. *Los Angeles*, 25 Sup. Ct. Rep. 18, 195 U. S. 223, 47 L. ed. 119, an opinion by Mr. Justice Day, among other things, said:

> "But notwithstanding this general rule of law, it is now thoroughly well settled by decisions of this Court that municipal ordinances, and by-laws and even legislative enactments undertaking to regulate useful business enterprise, are subject to investigation in the courts with a view to determining whether the law or ordinance is a useful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on lawful business, to make contracts, or to use and enjoy property."

In the case of *Lawton* v. *Steele*, 152 U. S. 133-137, 38 L. ed. 385-388, 14 Sup. Ct. Rep. 499-501, Mr. Justice Brown, speaking for the Court, among other things, said:

> "The Legislature may not, under the guise of protecting the business interests, arbitrarily interfere with private business or impose *unusual and unnecessary* restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final nor conclusive, *but is subject to the supervision of the courts.*" (Italics ours.)

The Supreme Court of the State of Oklahoma, in the case of *Walcher* v. *First Presbyterian Church of Norman, Oklahoma*, 76 Okla. 9, 184 Pac. 106, said:

"An ordinance of a regulatory nature in contravention of the natural rights of individuals, must be reasonable; that is, the *court* must be able to see that it will tend to promote the public health, morals, safety or welfare." (Italics ours.)

The Supreme Court of the United States, in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, said:

"The same principle has been more freely extended to the *quasi* legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these it was the doctrine that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principle of the common law of the land, particularly those having relation to the liberty of the subject, or the rights of private property."

In the case of *Reagan* v. *Trust Co.*, 154 U. S. 362, 397, 399, 410, 412, 14 Sup. Ct. Rep. 1047, the Court, among other things held:

"It is within the power and the duty of courts to inquire whether the body of rates prescribed by a Legislature or Commission is *unjust and unreasonable*, and such as to work a practical destruction to rights of property, and if so found to be, to restrain its operation. (Italics ours.)

"These cases all support the proposition that while it is not the province of courts to enter upon the merely administrative duty of framing a tariff of rates

for carriage, it is within the scope of judicial power and a part of judicial duty, to restrain anything which, in the form of regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new nor strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, organized body or the public as a whole) operates to divest the other of any rights of person or property."

In the case of *Hopkins* v. *Richmond*, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D 1114, the Court said:

"Whether a particular ordinance is unreasonable and thus void, is a question for the *Court*, but in determining it the Court will have regard to all the circumstances of the city and the objects sought to be obtained, and the necessity which exists for the ordinance." (Italics ours).

We now pass on to the proposition that any ordinance, rule or regulation adopted by a municipal corporation in exercise of the police power, in order to be valid and constitutional, must be reasonable.

In support of this statement, we desire to make the following observations, to-wit:

19 R. C. L., par. 112, p. 305:

"A municipal ordinance of a regulatory nature in contravention of the natural rights of individuals enacted under general charter powers, is not only required to be constitutional, but it *must be reasonable* as well; that is, the court before which it is brought

must be able to see that it will tend to promote the public health, morals, safety or welfare." (Italics Ours.)

19 R. C. L., par. 113, p. 809, speaking of municipal ordinances, says:

> "If it is manifestly unjust; if it discloses bad faith; if it involves such oppressive or gratuitous interference with the rights of the citizens as can find no justification in the minds of reasonable men, the court might well say that the Legislature never intended to give authority to make such rules; they are unreasonable and *ultra vires*."

The Court of Appeals of Maryland in the case of *City of Baltimore* v. *Radecke*, 49 Md. 217, said:

> "There may be a case in which an ordinance passed under grants of power like those we have cited is so clearly unreasonable, so arbitrary, oppressive or partial as to raise the presumption that the Legislature never intended to confer the power to pass it and to justify the court in interferring and setting it aside as a plain abuse of authority."

The Supreme Court of the State of Oklahoma, in the case of *Walcher et al.*, v. *First Presbyterian Church of Norman*, supra, said:

> "An ordinance of a regulatory nature in contravention of the natural rights of individuals *must be reasonable*, and the court must be able to see that it would tend to promote the public health, morals, safety and welfare." (Italics ours.)

The case of *Dobbins* v. *Los Angeles, supra,* involved a state of facts wherein the plaintiff, Dobbins, was attempting to erect a gas works in territory which was a district devoted almost exclusively to manufacturing purposes, having in its boundary a large amount of vacant and unoccupied land which was and continued to be useless except for the manufacturing establishments; that within said district at said time there was located a soap factory, a wool pulling factory, three wineries, numerous oil wells in operation, an iron foundry, brass factory, and an oil refinery; that immediately east of said location there were railroads and an extensive cannery and immediately north a refinery of the Standard Oil Company. The City of Los Angeles in that case adopted an ordinance prohibiting the erection of said gas works. Plaintiff complained of that ordinance as being unreasonable and unconstitutional. The Supreme Court of the United States, in deciding the Dobbins case, quoted from a California case, *Re Smith,* 143 Cal. 368, 77 Pac. 180, in which the Supreme Court of California, said:

> "But running current with this principle, and to be read with it, is one of equal importance, * * * namely, that when the police power is exerted to regulate a useful business or occupation, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizens to pursue any trade, business or vocation, which in itself is recognized as innocent and useful to the community. It is always a judicial question if

> any particular regulation of such right is a valid exercise of police power, though the authority of the courts to declare such regulation invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power, and infringes on rights guaranteed by the Constitution."

The Supreme Court of the United States in this case reversed the opinion of the Supreme Court of California and held that the city ordinance of the City of Los Angeles was void because of its unreasonableness, or at least held that the bill of complaint stated a cause of action, holding in that case that the city did not have a right, under the guise of enforcing police regulations, to arbitrarily interfere with the constitutional rights of a party to carry on a lawful business, to make contracts or use and enjoy property.

In the case of *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, Mr. Justice Brown, speaking for the Court, said:

> "The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class."

In the case of *Ex parte Throop*, 145 Pac. 1029, the Supreme Court of California held:

> "A city ordinance prohibiting the maintenance of certain factories, including stone crushers, within a large district of the city which was sparsely inhab-

ited and which contained 500 acres which were unimproved and practically uninhabited, but permitted them within a much smaller district which was densely inhabited, though by the poor classes, is unreasonable and void.

"The business of producing crushed stone for concrete work cannot be arbitrarily suppressed for interfered with by a city unless it is a nuisance or injurious to the health, comfort, safety or welfare of the inhabitants."

This was a case where one Throop was arrested for operating a stone crusher in violation of the provisions of a city ordinance. The plant that he was operating was in the Arroyo Seco, which was a wash. For a distance of about a half a mile on the east side of the wash the area consisted almost entirely of vacant and unimproved land. There were only four dwellings within a radius of 200 yards of the crusher. The area in the neighborhood of the stone crusher was made up of a large area of rugged, rough land and bushy wash, cut off from the rest of the neighborhood by high bluffs ranging from fifty to one hundred feet high. In the neighborhood and closer to the populous part of the city there were several railroads in operation. The land had scarcely any value other than that due to the building material found thereon. The City of South Pasadena attempted by city ordinance to prohibit the operation of the stone crusher. The Supreme Court of California, when deciding that case, said:

"The City of South Pasadena, in the exercise of the police power vested in it by our State Constitution, has the undoubted right to regulate the business of operating a stone crusher within the city limits, but such ordinance must be reasonable and must be for the purpose of protecting the public health, comfort, safety or welfare."

The Court further in that case said:

"In the case now under consideration, it is plainly manifest that the attempted regulation of the business conducted by the petitioner *has no relation to the ends for which the police power exists, namely, to protect the public health, comfort, safety or welfare.*" (Italics ours.)

The Supreme Court held that this ordinance was void as being unreasonable.

The Supreme Court of the United States, in the case of *Pennsylvania Coal Co.* v. *Mahon et al.*, 43 Sup. Ct. Rep. 158, 260 U. S. 393, 67 L. ed. 322, among other things, said:

"This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case.

"But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance *even if similar damage is inflicted on others in different places.* The damage is not common or public." (Italics ours.)

The same Court in the same opinion said:

> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In the case of *Nectow* v. *City of Cambridge et al.*, 277 U. S. 183, 72 L. ed. 842, 48 Sup. Ct. Rep. 447, Mr. Justice Sutherland said:

> "Governmental power to interfere by zoning regulation in general rights of landowner by restricting character of its use must bear a substantial relation to public health, safety, morals or general welfare.
>
> "Municipal zoning ordinance, including within residential district land not indispensable to general plan and adjacent to unrestricted property without any necessity for inclusion therein by reason of health, safety, convenience and general welfare of inhabitants of part of city affected, held in violation of the Constitution of the United States, Fourteenth Amendment."

The Court in the same case said:

> "An owner of property which borders on factories with the railroad tracks near is unconstitutionally deprived of his property without due process of law by zoning it into the residential class for which it cannot be profitably used where such action will not promote the health, safety, convenience and general welfare of the inhabitants of the part of the city affected."

In the case of *Abbey Land & Implement Co.* v. *San Mateo County*, 139 Pac. 1068, the Supreme Court of California said:

"In determining the advisability or necessity of a proposed police measure, the legislative body is presumed to take into consideration the circumstances and conditions under which the thing to be regulated or forbidden exists or may occur. The courts in considering the question whether or not such measure is reasonable in its application and effect, may also look to these general circumstances and conditions, so far as they are matters of judicial knowledge, and so far as they may be admitted or shown by undisputed, clear and satisfactory evidence in the record of the particular case. There are many instances in our own jurisprudence where this has been done."

In the case of *Continental Oil Co.* v. *City of Twin Falls et al.*, 286 Pac. 353, the Supreme Court of Idaho said:

"Ordinance prohibiting construction of a drive-in filling station within 500 feet of school grounds held clearly unreasonable, and therefore invalid, as applied to plaintiff's block, where such property by reason of size, shape and heavy special assessment was too valuable for residence purposes, and there was no increased fire hazard nor danger form explosion nor offensive odor within distance school was located from the filling station, and noise incident to operation of cars would not interfere with school work, and traffic on sidewalk was not of sufficient volume to render operation of service station dangerous to life, the ordinance violated the guaranties of the Constitution of the United States, Amendment 14, and State Constitution, Article 1, Section 13."

The Supreme Court of the State of Ohio in the case of *Youngstown* v. *Kahn*, 112 Ohio St. 654, 148 N. E. 842, 43 A. L. R. 662, said:

"A provision in an ordinance establishing a fraction only of the territory of a municipality into a district and providing that no building which is intended to be used as a dwelling shall be erected within the district except as a single or two family dwelling in a case where the record shows that the district is a most healthful part of the municipality in which to erect an apartment house, and that the public health, morals and safety of the district, and of the entire municipality will not be impaired by the erection of such an apartment house, constitutes a taking of property without due process of law and the taking of private property for public use without compensation and is invalid."

In *Re Gibbon*, 47 Pac. 1074, the Supreme Court of Oklahoma, among other things, said:

"To determine the validity of the ordinance in question in this case, we must first determine whether there has been a grant or delegation of authority by the Legislature of the Territory to the City of Oklahoma City to pass such ordinance. The City of Oklahoma City was not created by special charter, but is organized as a city of the first class under the provisions of general law of the territory, being Chapter 14 of the Statutes of 1893. Mr. Dillon, in his work on Municipal Corporations (1 Mun. Corp., 3rd Ed., p. 115), says: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no other: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable, *any fair, reasonable doubt concerning the existence of power is resolved by the court against the corporations and the power is denied.*" (Italics ours.)

In the case of *People* v. *Chicago*, 49 L. R. A. (N. S.) 438, the Court, among other things, said:

> "Statutes granting powers to municipal corporations are strictly construed and any fair and reasonable doubt as to the existence of a power must be resolved against the municipality."

In the case of *Village of Terrace Park* v. *Errett et al.*, 12 Fed. (2nd ed.) 240, the Circuit Court of Appeals of the Sixth Circuit, speaking through Circuit Judge Donahue, said:

> "Village, though duly authorized to adopt zoning ordinance, cannot exercise that power in such arbitrary and unreasonable manner that ordinance will be unconstitutional *in its operation and effect.* (Italics ours.)
>
> "Zoning ordinance of Village of Terrace Park adopted under authority of Act, Ohio, April 17, 1923 (110 Ohio Laws, p. 275), in its application to property within residence district sought to be used as a gravel pit, held unreasonable and violative of the Constitution of Ohio, Article 1, pars. 1 and 19, and Constitution of United States, Amend. 14, and par. 1."

In this case Russell Errett, a citizen of Florida, owned block 23 in the Village of Terrace Park, Ohio, which village is located about thirteen miles from the business center of Cincinnati. This particular block contained 8.8 acres of unimproved farm land that had never been subdivided into town lots.

In June, 1923, the council of the Village of Terrace Park, purporting to act under certain sections of the Ohio

statutes, established a village planning commission, which began its deliberations and certified to the village council a proposed zoning ordinance and map dividing the village into two districts, residential and business. The business district was established in and about the stores and shops in the northeastern portion of the village, and all of the rest of the territory within the village was designated as the residential district. Errett's property was in that portion of the village designated as a residential district. In 1924, Errett, who had been charged with offending against this ordinance, filed a bill in equity against the city to enjoin the enforcement of the ordinance insofar as it applied to block 23. He alleged that the ordinance was illegal and void and in violation of both the State and Federal Constitutions; that the ordinance was unreasonable and arbitrary and unconstitutional in its operation and effect.

The village filed its answer, denying the allegations of the bill and further alleged that the ordinance was not unreasonable or arbitrary, and that the adoption of the ordinance was in conformity with the provisions of the Constitution and laws of the State of Ohio. The trial court found, on the issues joined, for the plaintiff, and enjoined the Village of Terrace Park from enforcing the ordinance against the plaintiff or his successor in title. From this decree the village appealed.

The Circuit Court of Appeals held that in the disposition of the case it became unnecessary to determine the constitutionality of the Ohio statute conferring power upon the municipality to appoint a planning commission and to pass zoning ordinances, or the constitutional power of the village to pass such ordinance regardless of the authority conferred by the statute.

The Court held that for the purpose of deciding the case, it might be conceded that the village, in the exercise of its police power, either delegated to it by the statute or vested in it by the Constitution of Ohio, had the authority to pass a zoning ordinance reasonably necessary for the preservation of the public health, morals or safety, where such necessity appeared either from existing conditions or reasonable anticipation of future growth and development. However, the Court held that it did not follow that the village could exercise that power in such an arbitrary and unreasonable manner that the ordinance would be unconstitutional in its operation and effect, holding that if such power was so exercised the owners of the property whose constitutional rights were invaded would be entitled to the same relief as if the statute conferring the power were unconstitutional. The Court held that the owner of the fee simple estate in land had the same vested interest and property rights in the minerals in or underlying the land as the owner who has executed a deed to the surface,

reserving the mineral rights, holding that in either case the same rule applied in determining whether an ordinance is regulatory in its nature or amounts to the taking of private property without compensation.

The Court, in that opinion, among other things, said:

"There is also a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage and an ordinance that wholly deprives the owner of land of its valuable mineral contents. This difference was recognized by the Supreme Court in *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 36 Sup. Ct. Rep. 143, 60 L. ed. 348, in which case it was held that 'while an ordinance prohibiting the manufacturing of bricks within a specified section of a municipality may be a constitutional exercise of the police power, *quaere* whether prohibiting of digging the clay and moving it from that section would not amount to an unconstitutional deprivation of property without due process of law.' In this connection the court cited with approval Ex parte Kelsoe, 147 Cal. 609, 82 Pac. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the City of San Francisco upon the theory that such ordinance absolutely deprived the owners of real property of valuable rights incident to their ownership, but further held that operations of such stone quarry could be regulated. The court also cited with approval Reinman v. Little Rock, 237 U. S. 171, 35 Sup. Ct. Rep. 511, 59 L. ed. 900, in which case the operation of a livery stable was lawfully prohibited because that particular business was not affixed to or dependent upon its locality and could be conducted elsewhere.

"Evidence was offered by the village tending to prove that the dust and noise from the operation of that plant would not only be disturbing and annoying to its citizens, but a menace to the public health. Upon these questions there is a conflict of evidence, but there is no conflict of evidence tending to prove the distance the plant is to be located from the residences and schools in Terrace Park, or that this plant is to be operated by electricity and housed as far as possible, to prevent the escape of dust and subdue the noise of its operation. Upon a full consideration of all of this evidence we have reached the conclusion that the health of the citizens of Terrace Park will not be imperiled by the operation of this plant at such a remote distance from their homes, and that the possibilities of discomfort and annoyance is more imaginary than real and in no wise to be compared with the inconvenience or annoyance of the noise and soot of the trains that pass through this village every 30 minutes.

"For the reasons stated, this ordinance, if enforced in the terms in which it is written, or to any extent beyond the limitations imposed by the decree of the District Court would be arbitrary, unreasonable and unconstitutional in *its operation and effect*, and not merely regulatory in character, but a taking of private property without compensation." (Italics ours.)

In other words, the Circuit Court of Appeals held that the village zoning ordinance, although it might have been enacted pursuant to a power conferred upon the city and although valid in all respects, was inoperative as to the plaintiff's particular property because of the location of the property and because the enforcement thereof, as applied to the plaintiff's particular property was unreason-

able and the effect of the enforcement thereof and its operation and effect would have been to have deprived the plaintiff of valuable property rights.

In the case of *Re John Kelso*, 147 Cal. 609, 82 Pac. 241, the Supreme Court of the State of California, in passing upon an ordinance adopted by the City of San Francisco prohibiting the operation of rock or stone quarries within certain portions of the city, said:

> "The effect of the ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within certain designated limits of the City and County of San Francisco is to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership, viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of. While the use to which a man may put his property may be restricted or regulated by the State, in the exercise of its police power, so far as may be necessary to protect others from injury from such use, it is, of course, elementary, that the enjoyment of one's property cannot be interfered with or limited arbitrarily. As is said in Tiedeman's Limitations of Police Power, the next thing to depriving a man of his property is to circumscribe him in its use. A limitation of the use *pro tanto* deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property without due process of law. While in the exercise of its police power the State may limit or regulate the use, any such limitation or regulation must find its justification in the necessity for the protection of the legal rights of others. If it does not, it is an unwarrantable invasion of property rights, against which the courts will protect."

In the case of *Pacific Palisades Association* v. *City of Huntington Beach et al.*, 237 Pac. 538, the Supreme Court of California, among other things, said:

> "Although use of property may be restricted or regulated, in exercise of police power, so far as necessary to protect others from injury from such use, enjoyment of the property cannot be interfered with or limited arbitrarily.
>
> "Although municipalities may by zoning ordinances regulate use of property within delineated areas and districts as reasonably necessary to health, safety, morals and general welfare, zoning ordinances must not impose an unwarranted and arbitrary interference on right to carry on lawful business, make contracts or use and enjoy property, under guise of police regulations; reasonableness being subject to investigation in courts."

The same Court in the same case in the body of the opinion says:

> "The business of boring for and producing oil is a lawful enterprise."

This case of *Pacific Palisades Association* v. *City of Huntington Beach* is a case wherein the City of Huntington Beach was attempting to interfere with the plaintiff in error in the drilling of an oil well within the city limits under authority of certain city ordinances. The plaintiff brought an action seeking to enjoin the city from interfering with the plaintiff in the erection of derricks, installing machinery and drilling oil wells on its own lands within

the city limits. The plaintiff in this case had acquired certain property rights and had obligated itself to drill certain oil wells prior to the time of the adoption of the city ordinance. Plaintiff alleged that its property was proven oil land, and that within close proximity there were now producing probably twenty wells; that the area within close proximity to said property was sparsely settled and a large part of it was vacant and unoccupied by residences, there not being more than twenty houses in that section of the city. The court held that an attempt to prohibit the extraction of oil from that ground was not a proper exercise of police power.

In the case of the *City of North Muskegon* v. *Miller*, 227 N. W. 743, the facts were about as follows:

In 1925 the city adopted a zoning ordinance by virtue of which the property on which it was sought to drill the oil well was restricted in its use to single family dwellings, churches, schools, libraries, farming and truck gardening and private clubs.

In 1928, shortly after oil had been discovered within the corporate limits of plaintiff, an ordinance was passed making it unlawful to drill wells for the purpose of obtaining oil and gas without first securing a permit from the council of plaintiff. Notwithstanding these two ordinances, defendant Miller, as lessee of the property, in the

year 1928, together with the defendant Voorhees, the oil drilling contractor, after two unsuccessful efforts to secure a permit from the city, proceeded to drill an oil well without a permit on the property described herein.

The city instituted an action to restrain the defendants from proceeding with their drilling operations and after a hearing a final decree was entered permanently enjoining defendants from drilling the well. From this decree defendants appealed, claiming that the zoning ordinance and the oil drilling ordinance were not properly adopted, and that the zoning ordinance was unreasonable and unwarranted by the police power; and that it violated the Constitution of the State of Michigan, and the Fourteenth Amendment to the United States Constitution. The property upon which the defendants were attempting to drill the well was a part of the lowlands. The well was being sunk at a point variously estimated from 300 to 600 feet from Ruddiman avenue, 550 feet from the bluff and 150 feet from the water. Adjacent to the lot upon which the well was being drilled to the east was the city dump for refuse and garbage, which at various times gave off a very unpleasant odor. About 220 feet west of the oil well was a water well which furnished about half of the water supply of the city. Bordering the land on the west was a clump of trees, known as Bigelow's Grove, which partially shielded the proposed oil well from the view of a few new

houses erected about two blocks to the west. A little less than a mile west of the proposed oil well was the most active of the better residential subdivisions. At least a portion of the lowlands is marsh, practically a barren waste, uncultivated and unimproved. The land along the bluff on Ruddiman Avenue, which was not to exceed 809 feet from the well, was fairly built up with substantial residences. Along the lowlands, however, for a distance of a mile and a half east there are only thirteen residences, only one of which is used as a permanent residence. All the witnesses testified that the lowlands was useless for residential purposes.

The Supreme Court of Michigan, in passing upon this case, held the zoning ordinance adopted by the City of North Muskegon, insofar as it applied to the particular property involved in that action was invalid, being an unreasonable and unwarrantable interference with the rights of the defendants. The Court said :

> "It will be readily seen that the property in question is almost worthless if its use is to be restricted as provided in the zoning ordinance. The courts have particularly stressed the importance of not destroying or withholding the right to secure oil, gravel or mineral from one's property, through zoning ordinances, unless some very serious consequences will follow therefrom. The effect of the zoning ordinance in the cause at issue amounts almost to a confiscation of the property. The legality of a zoning ordinance, when reasonable, has been long recognized by our courts.

Although the question is comparatively new in Michigan, its legality has been upheld a number of times. Zoning ordinances have been upheld by the United States Supreme Court in many instances, the leading case being that of *Village of Euclid* v. *Ambler Realty* Co., 272 U. S. 365, 47 Sup. Ct. 114, 71 L. ed. 303, 54 A. L. R. 1016. It is, however, necessary that a zoning ordinance be reasonable, and the reasonableness of it becomes the test of its legality. Any ordinance to be legal must be reasonable.

"A careful inspection of a map of the restricted property involved in the present case convinces us that the zoning ordinance is unreasonable *as far as this particular piece of property is concerned. The City of Muskegon itself has shown its lack of regard for the property by using a parcel almost adjacent thereto as a dumping ground for garbage and refuse.* The property consists of marshy lowlands, which are unfit for the purpose to which they are limited by the zoning ordinance. We only pass upon the question of the reasonableness of the zoning ordinance as applied *to the particular section of the city where this property is located.* We find that the zoning ordinance *as applied to the property in this case is unreasonable and confiscatory, and therefore illegal.*" (Italics ours.)

In order that a municipal regulation may be sustained as an exercise of the police power the regulation must have for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals or general welfare. The exercise of the police power must have a substantial basis. The power cannot be made a mere pretext for regulations that do not fall within it. There must be some clear, real and substantial con-

nection between the assumed purposes of the regulation and the active provisions thereof, and the provision must in *some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised.*

Would the giving of a $200,000.00 bond by the plaintiffs in this case, as required by the city, in any plain, appreciable and appropriate manner tend towards the promotion of either of the objects to secure which the city may exercise its police power viz., the preservation of public health, safety, morals or general welfare? We are unable to see how such a bond would preserve the health, safety, morals or general welfare of the community as a whole. If the drilling of the well itself constitutes a menace to the health, comfort, morals, safety or general welfare of the people, the drilling of the well, after the bond has been made, would be no less a menace than it was before the bond was given. The only thing the bond would do would be to protect the individual citizens of the city against any damage that either of them might incur by reason of the drilling of the well by the plaintiffs in error. In other words, the ordinance attempts, by police regulation, to afford the basis of a civil action between its citizens. A municipal corporation has no power to create a civil liability between individuals. The Legislature cannot delegate to a city the power to enact a law that will

afford the basis of an action between citizens *inter sese*. The power to regulate the actions of citizens between each other that may be exercised by the municipality arises entirely out of police power and the right of civil action cannot arise out of a mere police regulation. No where does the law confer upon the city the right to enact an ordinance that will or should afford the basis of a civil action between citizens *inter sese* for the violation of such regulation. This is one of the things the city is seeking to do in requiring the giving of the $200,000.00 bond.

In the case of *Harrigan & Reed Company* v. *Frank Burton et al.*, 224 Mich. 564, 195 N. W. 60, 33 A. L. R. 142, the City of Detroit adopted an ordinance regulating the business of selling and installing heating systems and apparatus in dwellings in the City of Detroit. The first section of the ordinance provided that no person, firm or corporation shall install, or cause to be installed, any heating or warming system or apparatus in dwellings in the City of Detroit without a contractor's license from the department of buildings and safety engineering, and filing a bond in the sum of $1,000.00 to indemnify purchasers of heating and warming systems or apparatus installed in dwellings in Detroit under this ordinance, if such systems or apparatus are found not to comply with the provisions of this ordinance and rules formulated under paragraph 8. There

were quite a number of additional sections to this ordinance. The plaintiff in error attacked the ordinance on the ground that it was void because the city had no right in the exercise of its police power to require the giving of a bond to indemnify purchasers from the plaintiff. The Court, in that case, among other things, said:

> "Unquestionably the municipality, under its general police power, has authority to adopt proper and reasonable ordinances having for their purpose prevention of fires and protection of life and property from conflagrations, as, within reasonable and legal limits, its legislative body may deem a public necessity; but municipal ordinances, though ostensibly enacted as public regulations, which are so framed as to control or regulate a common and useful private business or occupation in life, are subject to review and investigation in the courts, to determine their validity by the test of whether, under the guise of police regulation, there is an arbitrary, unreasonable or unwarranted interference with the constitutional rights of the private citizen to pursue a lawful business or calling, and to make contracts with others in relation thereto (citing cases).
>
> "The business of installing heating and warming systems or apparatus in dwellings in the city of Detroit and elsewhere, and to make contracts for so doing, is in itself a harmless, useful and necessary industrial pursuit. By this ordinance no person, firm or corporation can engage in that business in Detroit without a contractor's license, secured from the department of building and safety engineering and filing a bond of $1,000.00 to indemnify purchasers from it, or them, of the heating system or apparatus to be installed in dwellings in Detroit. Compelling a bond from the contractor to protect or indemnify the pri-

vate citizen who chooses to make a legitimate contract with him for the purchase of a heating system or warming apparatus, and installing it in his private dwelling, suggests a measure of paternalism in the ordinary business relations of private parties beyond the normal scope of the police power of a municipality, as intimated in People ex rel. Valentine v. Berrien Circuit Judge (People ex rel. Valentine v. Coolidge), 124 Mich. 664, 50 L. R. A. 493, 83 Am. St. Rep. 352, 83 N. W. 594. It was there said that even the legislature of this state is 'not empowered by the Constitution to regulate contracts between its citizens, who are engaged in legitimate commercial business, or to require any class of persons to pay a fee for the right to carry on business, or to give a bond to perform their contracts which other parties may choose to make with them'."

The requirement of the city for the $200,000.00 bond in the instant case amounts to a prohibition instead of a regulation prohibiting the plaintiffs in this action from removing minerals from lands. It amounts to a prohibition and not a regulation in the following respect: It is conditioned that said bond shall be made by a surety company authorized to transact business within the State of Oklahoma. The record discloses that surety companies authorized to transact business in this State, before they will make such a bond, require applicants for the bond to make a financial statement showing a net worth of at least a million dollars, or to deposit with the surety companies collateral securities of the value of approximately $250,000.00. These securities must be such as are readily

convertible into cash. Appellants in this case testified that they were unable to comply with the requirements of the surety companies, and therefore unable to furnish such a bond. Even had the plaintiffs been able to put up with the surety company collateral security, then it would still be optional with the surety company as to whether or not they would execute such a bond for the plaintiffs. In other words, requiring such a bond places the matter entirely within the hands of surety companies authorized to do business in this State to say whether or not any particular person, firm or corporation would be entitled to drill a well within the corporate limits of Oklahoma City. Had the plaintiffs been able to put up a million dollars worth of security with the surety company, there is no way that they could have compelled the surety company to execute such a bond as surety.

The record in this case discloses that the well is being drilled upon a piece of property that has been used for a period of more than twenty years as a city dump garbage and refuse; that there are no places of habitation within half a mile of it; that surrounding it there is nothing but vacant, unimproved waste land. The condition of the property with reference to its location is very similar to the property involved in the case of *City of North Muskegon* v. *Miller et al.*, supra, and the case of *Pacific Palisades Association* v. *Huntington Beach*, supra. In each of which

cases the courts held that the city was without power to prohibit the drilling of oil wells.

The requirement of the city ordinance relative to the giving of the bond suggests a measure of paternalism in the ordinary business relations of private parties beyond the normal scope of the police power of the municipality as intimated in the case of *Harrgan & Reid Co.* v. *Burton et al., supra.*

The case of *Geo. Bolln Company* v. *North Platt Valley Irrigation Co.*, 121 Pac. 22, involved the constitutionality of a statute of the State of Wyoming. Said statute provided that whenever any ditch or canal company, or other owner, shall contract for the construction of a ditch, canal or reservoir, such company shall take from the contractor a bond conditioned for the payment of persons who supply such contractor with labor, farm products or goods of any kind for all just debts incurred in carrying on such work, and on failure to take such bond, such company or owner shall be liable to the full extent for all debts of such contractor or sub-contractor. It also involved the constitutionality of that portion of the same act which required that the bond provided for should be taken in some guaranty or surety company authorized to do business within the State. In other words, the State of Wyoming had provided that before a ditch or canal company or other own-

er, could contract for the construction of a ditch or canal, it should execute a bond conditioned as provided by said statute, and that said bond should be executed by some guaranty or surety company authorized to do business within the State as surety. The Supreme Court of the State of Wyoming in that case held that this provision of the statute requiring said bond to be executed by some guaranty or surety company authorized to do business in the State, violated both the State Constitution and the Fourteenth Amendment to the United States Constitution. The Court, in that case, said:

> "The only remaining question to be considered is that the bond required by the statute must be 'in some guaranty or surety company authorized to do business in this State.' Prior to the adoption of this statute and the similar one applying to railroad companies passed at the same session of the Legislature, all bonds required by law so far as we have been able to discover, were permitted to be given with either personal or surety company security; and if personal security is sufficient for public officers, executors, administrators, etc., and in court proceedings, why not in this class of bonds? As was said by the Supreme Court of Ohio in the case of State v. Robbins, 71 Ohio St. 273-291, 73 N. E. 470 (69 L. R. A. 427, 2 Ann. Cas. 485): 'It is very plain that the surety companies may be greatly benefited by this legislation, but an adequate corresponding benefit or protection to the general public, such as would justify such a radical and drastic limitation upon individual rights is not apparent.' The Ohio statute considered in that case requiring official bonds (with certain exceptions) and administrators' bonds above $2,000.00 to be surety company bonds, un-

less an affidavit was filed that application had been made to such company and refused, was held to be unconstitutional. The statute we are considering *places it within the power of the half dozen surety companies authorized to do business in this State to prevent* any ditch or canal company or other owner from letting a contract for the construction of any ditch, canal or reservoir, except under the penalty of becoming personally liable for the unlimited debts of others for things which have not gone into the work, and due to persons with whom the owner has no contractual relations. Or, if they become surety on such bond, they may charge what they please therefor. Such a requirement, in our opinion, is not only an unwarranted restriction upon the liberty to contract, but a denial of the equal protection of the laws; and in so far as the statute *requires a surety or guaranty bond,* and creates a personal liability for other things than labor and materials which actually go into the work and thereby enhance the value of the property, it must be held to be unconstitutional and void." (Italics ours.)

An Act of the General Assembly of Pennsylvania gave to cities in that state the right to regulate transportation of passengers and property by motor vehicles not operated on tracks. Under this statute the City of Wilkes-Barrie passed an ordinance regulating the running of a jitney, and requiring the owners thereof to furnish and keep in full force and effect at all times either a bond with a responsible surety company or association authorized to do business under the laws of that state in the sum of $2500.00 conditioned to pay all loss or damage that might result to any person from the negligent or reckless opera-

tion of such jitney. Action was commenced to enjoin the City of Wilkes-Barrie from the enforcement of this ordinance. At the trial of that case the evidence disclosed that several surety companies refused to insure or bond jitneys under this Ordinance, and that others would do so providing that cash or collateral to the amount thereof was furnished by the insured. One company apparently was willing to write such liability. In the opinion the Court said:

> "In the present case bond required is restricted to one furnished by a surety company while the evidence shows that it is difficult to procure such a bond from a surety company. Under the circumstances we think the exclusion of personal sureties is not justifiable or reasonable. A municipality is entitled to require good and sufficient security, but beyond that it should not go. The terms of the ordinance in this respect would forbid the deposit of cash or a certified check or municipal bonds as surety by the applicant for a permit, or the acceptance as surety upon his bond of individual free-holders of unquestioned financial responsibility. We know of no other instance in which, where security is required by law to be given, an attempt has been made to confine such security to surety companies to the exclusion of solvent and responsible personal sureties."
>
> *Jitney Bus Association* v. *Wilkes-Barrie*, 256 Pa. 462, 100 Atl. 954.

These operations were with respect to the use of the public streets, while in the case at bar the same applied only to private property.

A very recent and instructive case is that of *State of Washington ex rel., Seattle Trust Company* v. *Roberge*, 278 U. S. 116, 73 L. Ed. 210. The court there held:

> "Zoning ordinances must find their justification in the police power exerted in the interest of the public.
>
> "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.
>
> "The right to devote real estate to any legitimate use is property within the protection of the Constitution.
>
> "A provision of a zoning ordinance making the right to maintain a home for aged persons within a particular district depend upon consent of the owners of two-thirds of the property within 400 feet of the proposed building violates the due process clause of the Federal Constitution."

The principal announced in this case is applicable to the case at bar. It was held there that it was an unconstitutional taking to require the consent of owners within 400 feet of the property to be used. This consent was necessary under the ordinance before the owner could use his property for the purpose specified in the ordinance. The subject was one within the police power for zoning purposes and yet it was held unconstitutional because it required the consent of third parties, to-wit: the owners of property within 400 feet of the property affected by the ordinance. Applying that principle to the ordinance now

under consideration, we find that no well can be drilled without posting a $200,000.00 bond executed by a paid surety company, and that, under the undisputed evidence, and as a matter of right such sureties must give their consent, before they sign such a bond and that there is no way anyone can force their consent. This being true, this provision of the ordinance is clearly void under the decision just cited. The court in the opinion, says:

> "The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. Yick Wo v. Hopkins, 118 U. S. 356, 368, 30 L. Ed. 220, 225,

226, 6 Sup. Ct. Rep. 1064. The delegation of power so attempted is repugnant to the due process clause of the 14th Amendment. Eubank v. Richmond, 226 U. S. 137, 143, 57 L. Ed. 156, 158, 42 L. R. A. (N. S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; Browning v. Hooper, 269 U. S. 396, 70 L. Ed. 330, 46 Sup. Ct. Rep. 141."

Now applying the two principles there announced to the ordinance involved in the case at bar: A. The requirement of the bond has no perceptible relation to the general or public welfare because it aids only the individual who might claim damages. It does not make the operations any safer. B. The major corporations are the only ones that can qualify by giving the $200,000.00 surety bond. It therefore creates a monopoly in their favor to drill in the corporate limits. While under the evidence Gant & Garvin and A. D. Hudspeth, plaintiffs in error, are perfectly competent to develop for oil and gas and are perfectly solvent, while there are many other persons just as competent and solvent, yet these comparatively small concerns cannot drill in the city limits for the reason they do not have it within their power to make the surety bond. Thus a monopoly is created in favor of the major oil corporations, innocent enough on the face of it, but existent in fact in the actual operation and enforcement of the ordinance. In other words, there is no way to force a surety company to sign such a bond, for all persons in like situation while, under the evidence they will make such bonds for some companies without question.

May we suggest in conclusion that the appellants are asking relief only from the one provision of the City Ordinance which (a) is not within police power and is unreasonable, and which (b) prevents the development of appellant's property because they cannot make a bond the measurable standard of which lies within the will or caprice of another to give or withhold. This renders them subject to the will of another, rather than to a given standard of conduct with which all careful and solvent operators can comply, as guaranteed by the constitution of the United States. All other and reasonable provisions of the ordinance appellants have cheerfully complied with. The provision complained of, no person, firm or corporation can comply with without the consent of a third person, over whom neither the owner of the property or the courts have any control.

WHEREFORE, it is respectfully submitted that the judgment of the Supreme Court of Oklahoma be reversed with proper directions and for full relief.

Respectfully Submitted.

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NO. 547

In the Supreme Court of the United States

October 1932 Term

WALTER H. GANT, KNOX L. GARVIN,
and A. D. HUDSPETH,
Appellants.

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation,
and J. W. VANMETER,
Appellees.

REPLY BRIEF

Since appellants' brief was prepared the Supreme Court of the United States has handed down the decision in the case *of R. S. Sterling, Governor of the State of Texas,* vs. *E. Constantine,* 77 L. ed. 254, where this court uses the following language:

> "The right of the owner of petroleum-producing property to its enjoyment and use, subject to reasonable regulation by the state in the exercise of its power to prevent unnecessary loss, destruction, and waste, is protected by the due process clause of the Fourteenth Amendment."

This property right of the appellants was violated by delegating to the surety companies the option to say whether or not the owner could produce oil and gas from their property.

The courts hold that permitting others than the legislative authorities to decide whether property shall be put to a certain use is a delegation of legislative authority. This is the reason lying back of the holding that such enactments are violative of the 14th amendment.

The latest expression that we have been able to find is the case of *Re: Samuel Perrin*, 305 Pa. 42, 156 Atl. 305, 79 A. L. R. 912. The opinion reads:

> "Where an ordinance shows that a use is not opposed to public health, safety, morals, or general welfare, or is not a nuisance, and is in harmony with public interest and the general scope of the zoning ordinance, but the consent of a given set of individuals must be procured before land may be devoted to such use, the delegation of such power to these individuals is repugnant to the due process clause of the Fourteenth Amendment. The reasons for holding consent ordinances invalid may be summed up thus: The consent provision is an unlawful delegation of legislative authority and discretion, with no rule or standard to guide those whose decision will control. It is not possible to check or correct the acts of the persons who may or may not consent; consent or refusal may be the result of favoritism, caprice, or malice, and no responsibility can be placed on those who act in the matter."

This decision is based on and follows the decision of this court in *State of Washington ex rel.* vs. *Roberge*, 278 U. S. 116, 73 L. ed. 210.

So in the case at bar the legislative authorities of the City have recognized that it is not against the public interest to permit drilling at the place in question; but by the same fiat they have said the owner cannot drill without the consent of one or more sureties over whom the owners have no control.

The learned opinion of this court in the recent case of *Hodge Drive-It-Yourself Co.* v. *Cincinnati*, 284 U. S. 333, 76 L. ed. 323, illustrates the difference between a regulation of the use of one's own property and the right to impose conditions upon or prohibit the use of public streets and highways.

The ordinance there, which prescribed the giving of a surety bond where the public streets were used to carry on private business for gain was upon the specific ground that the city had the right to condition or prohibit such a use, not regulate it. There is a vast difference between prescribing an impossible condition in respect to the use of one's own property, and placing condition on the use of a public street for private gain.

The court says:

> "This ordinance is not an interference with or regulation of a business that has no relation to matters of public concern; it rests upon the power of the city to prescribe the terms upon which it will permit the use of its streets to carry on business for gain."

It is suggested by appellees that equitable jurisdiction might not be invoked to enjoin the enforcement of this unconstitutional ordinance for the reason that the appellants applied to and secured from the Board of Adjustment of the City of Oklahoma City an order and judgment authorizing the issuance of the permit herein. That an appeal might be necessary from said order and an estoppel worked by reason of complying with the valid provisions of the ordinance.

This position is untenable for several reasons.

1. The evidence shows that the executive officer of the City to-wit; the Building Superintendent, refused to carry out the order of the Board of Adjustment unless and until the unconstitutional bond was furnished. The statute of the state provides for no appeal from his executive order.

2. Where the property owner has made a proper application for a permit and the executive officer has refused to issue the same on account of an unconstitutional ordinance, equitable jurisdiction is clear to enforce the right of the property owner.

Village of Euclid vs. *Ambler Realty Co.*, 272 U. S. 365, 71 L. ed. 303, 54 A. L. R. 1016, 47 Sup. Ct. Rep. 114.

State of Washington ex rel Seattle Trust Company vs. *Roberge*, 278 U. S. 116; 73 L. ed. 210.

Terrace v. *Thompson*, 263 U. S. 197, 215, 68 L. ed. 255, 274, 44 Sup. Ct. Rep. 15.

Pierce v. *Society of Sisters*, 268 U. S. 510, 535, 69 L. ed. 1070, 1078, 39 A. L. R. 468, 45 Sup. Ct. Rep. 571.

WHEREFORE, it is respectfully submitted that the judgment of the Supreme Court of the State of Oklahoma be reversed and the cause remanded with proper directions.

Respectfully submitted.

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Number 547

Supreme Court of the United States

October 1932 Term

WALTER H. GANT, KNOX L. GARVIN AND A. D. HUDSPETH, APPELLANTS,

vs.

CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION, and J. W. VAN METER, APPELLEES.

BRIEF OF APPELLEES

STATEMENT OF HISTORY OF CASE

This case was begun by the appellants as plaintiffs in the District Court of Oklahoma County, Oklahoma, on October 2, 1930, by the filing of a petition for an injunction against the City of Oklahoma City, a municipal corporation, and J. W. Van Meter, Building Superintendent of said City. The plaintiffs, by this petition, sought to enjoin the defendants in the enforcement of the bond provisions of the oil drilling ordinance, which provision required the filing of a bond of $200,000.00, to be executed by some "bonding or indemnity company authorized to do business in the State of Oklahoma."

The defendants filed an answer and cross-petition in which they asked for an injunction against the plaintiffs by reason of their

failure to file such bond, and the case proceeded to trial. The trial court denied the plaintiffs any relief on their petition and sustained the defendants in their cross-petition, granting the defendants a temporary injunction against the plaintiffs from drilling an oil well upon the premises, by reason of the failure of the plaintiffs to file such bond.

From this order granting the defendants a temporary injunction against the plaintiffs an appeal was taken to the Supreme Court of the State of Oklahoma, where the judgment of the trial court was affirmed. *Gant et al.* v. *Oklahoma City*, 150 Okla. 86, 6 Pac. (2d) 1065.

From this ruling of the Supreme Court of Oklahoma the plaintiffs prosecuted an appeal to the Supreme Court of the United States, which was dismissed for want of jurisdiction (52 S. Ct. Rep. 203, 284 U. S. 594).

The original case then came on for hearing in the District Court of Oklahoma County, Oklahoma on application for permamanent injunction and after full trial the trial court again denied the plaintiffs any relief and rendered judgment upon the defendants' cross-petition, permanently enjoining the plaintiffs from proceeding with the drilling of a well on said property.

From this judgment the plaintiffs prosecuted an appeal to the Supreme Court of Oklahoma, where the judgment of the trial court was again affirmed, 15 Pac. (2d) 883, (------Okla.------) The appeal from this last decision is now lodged in this Court for determination.

STATEMENT OF THE CASE

The appellants have set out an abstract of the pleadings; however we desire to more specifically call attention to the allegations of the appellees' answer and cross-petition. Omitting the formal parts this pleading is as follows (R. 4-7):

ANSWER

"Come now the defendants, the City of Oklahoma City, Oklahoma, and J. W. Van Meter, and for answer to the petition of plaintiffs filed herein, state:

"1. That said petition fails to state facts sufficient to constitute a cause of action in favor of plaintiff and against these defendants.

"2. That the petition shows on its face that the plaintiffs made application to the city, and were granted a permit to drill a well on the property set out in the petition of plaintiffs, conditioned that the plaintiffs comply with the ordinances and execute a bond as provided by the ordinances of the City of Oklahoma City, and especially Section 21 of Ordinance No. 3944, being an amendment to Chapter 22 of the General Ordinances of 1928, and commonly known as the drilling provision of the zoning ordinance, and that the plaintiffs sought the benefits of said ordinances insofar as they might operate in favor of plaintiffs, and now seek to destroy the provision which they do not desire to comply with, and by reason thereof, the plaintiffs, and each of them, are estopped to maintain this action.

"3. That the plaintiffs show by their petition that they have not exhausted the adequate remedy at law provided by Chapter 178, Session Laws of 1923, and Chapter 22, Revised Ordinances 1928 of said City, and therefore, they are not entitled to maintain this action.

"4. The defendants deny generally and specifically each, every and all the material allegations in said petition contained."

CROSS-PETITION

"Come now the defendants, the City of Oklahoma City, and J. W. Van Meter, as Superintendent of Buildings for said City, and for their cross-action against the plaintiffs, allege and state:

"1. That the plaintiffs, Garvin and Gant, is a partnership composed of Knox L. Garvin and Walter H. Gant, the said Knox L. Garvin being a resident of Stephens County, Oklahoma, and the said Walter H. Gant, being a resident of Carter County, Oklahoma; and the plaintiff A. D. Hudspeth is a resident of Oklahoma City, Oklahoma.

"2. That the defendant, the City of Oklahoma City, Oklahoma, is a municipal corporation existing under and by virtue of the laws of the State of Oklahoma under a charter duly adopted and approved, as provided by law.

"3. That prior to the_____day of_____, 1930, the plaintiffs made application to the Building Commissioner of the City of Oklahoma City for a permit to drill an oil or gas well on Block 9, Meads Addition to the City of Oklahoma City, which said application was denied and from which the said plaintiffs appealed to the Board of Adjustment of said City, pursuant to Chapter 22, Oklahoma City General Ordinances of 1928, and amendments thereto. That said appeal was heard, and on the 15th day of September, 1930, the Board of Adjustment, aforesaid, made an order granting to the plaintiffs the right to obtain a permit for the drilling of one oil and/or gas well on Block 9, Meads Addition, aforesaid, and in addition thereto made certain other orders in connection with said property and the drilling of said well, and in addition thereto ordered that the plaintiffs comply with all ordinances and regulations of said City and all terms of all ordinances then in force or thereafter put in force in said City relating to the drilling, operation and maintenance of a well upon said property for which said permit was granted, a copy of said order is hereto attached and made a part hereof, and marked 'Exhibit A'.

"That after the granting of said order the plaintiffs went

upon said property without obtaining a permit and without comlying with the ordinances of the City, as hereinafter set out, and did commence the active drilling, and is now engaged in the active drilling of said well, and the defendant, the City of Oklahoma City, is informed and believes and, therefore, charges that the plaintiffs have drilled said well to a depth in excess of ----------feet and are about to penetrate the oil or gas bearing horizon or sand, without having obtained a permit and without having complied with said ordinances of said City in relation to the drilling, operation and maintenance of said well in this:

"That the plaintiffs have failed to obtain a permit from the Building Superintendent pursuant to the order of the Board of Adjustment.

"That the plaintiffs have failed and neglected to execute a bond in the amount of Two Hundred Thousand Dollars ($200,-000.00) conditioned that the plaintiffs will pay and discharge any liability imposed by law for damages on account of injury to property, either private or public, or bodily injury, including death, received or suffered by an person or persons, firm or corporation resulting from the drilling, operation or maintenance of said well or structures incident thereto.

"Wherefore, these defendants pray that the court restrain the plaintiffs, and each of them, their servants, agents and employees, from drilling or continuing the drilling of said well upon said property until the plaintiffs have complied with the ordinances of said City and obtained a permit and executed a bond, as required by said ordinances, and that upon final hearing the temporary order be made permanent, and that these defendants have such other, further and additional relief to which it may be entitled in the enforcement of said ordinances."

EVIDENCE

The appellants have set out an abstract of the evidence, however we desire to call attention to some additional testimony of the witnesses, as shown by the record.

The witness Lemen testified that this location of the well on Block 9, Mead's Addition, was less than one-half mile from some stores and that there were certain railroad buildings about 300 yards from the well (R. 10); that the location itself was about one mile from the City Hall (R. 24); that between the City Hall and a point one-half mile from the well the City was built up with valuable business and wholesale buildings (R. 26); that within that area were located the Santa Fe and M. K. & T. depots (R. 27); that the prevailing winds in Oklahoma City were from the south and southeast, the City Hall being to the north and west of this location (R. 27-28); and, further, that if the Mary Sudik well, which had been out of control for a period of days, had been on this Block, 9, Mead's Addition, that the entire business section of the City would have been covered with oil (R. 27).

The witness Thomas C. Vaughn further testified that there were 574 wells in the Oklahoma City field, 21 of which were within the City limits; that 12 wells in the field had been beyond control (R. 29), and that 2 of them had been on fire while flowing and out of control (R. 31). He further testified that the Mary Sudik well in the local field during the time it was out of control and flowing had sprayed oil for about 2 miles, and another well, the Sigmon, had sprayed oil for a mile or more. He further testified that as long as the human element was to be dealt with in the drilling of wells that it could not be said with any degree of certainty that any well would not get out of control; that if such happened to a well in Block 9, Mead's Addition, that it would necessarily be

a greater hazard because of its proximity to the business district of the City than would a well further removed from the business district (R. 34-35).

The witness Charles K. Scruggs also testified that his company made the same requirement with regard to bonds for an individual or independent operator and the "so-called major companies" and that this was true with reference to all of the surety companies of which he had knowledge. (R. 39.)

The witness A. D. Hudspeth recognized the human element in the drilling and operation of oil wells and the hazards incident thereto through negligence of those in charge (R. 45).

The witness Knox L. Garvin testified that he had made application to the Building Commissioner for a permit to drill this well, which had been denied, and on appeal to the Board of Adjustment it had been granted conditioned upon the filing of bond; that he had complied with all of the requirements of the ordinance except as to the matter of posting the surety bond required (R. 52-53). He further testified that all wells within the City were being drilled under bonds required by the ordinance (R. 58-59); that there were within the U-7 or drilling zone of the City, and within the City limits, approximately twelve to fifteen hundred acres; that of that area probably fifty per cent was settled up with residences, business and industry (R. 56). It was further shown by the testimony of this witness that in his offer to post a personal bond no principal sum of such bond was discussed nor was a definite bond tendered (R. 54).

The witness Bradford further testified that there is no certainty that threads on the valves would not become worn and that if there is any negligence in caring for such portions of the drilling outfit that a well would get beyond control (R. 71). He further testified that there had been 2 wells beyond control and running wild within the last six months (R. 70-71), and, further, that he had never seen a state inspector inspecting any wells within the City limits (R. 72).

The witness H. H. Wegner testified that he was a drilling contractor and that if a well came in like the Mary Sudik well at the location in question that it would be a hazard and that a well like the Stamper Number 3 on fire would probably set fire to a house within a distance of three or four hundred feet (R. 75-76).

The witness Smith, although a witness for the appellants, admitted that the human element was to be considered in reference to hazards in drilling for oil or gas (R. 77-78).

We have called attention to this additional testimony in order to point out to the Court the fact that each witness recognized the hazard which would be created by negligence on the part of anyone engaged in the drilling or operation of a well. This is a matter of which the Court will take judicial notice, as we will point out further in this brief.

ARGUMENT AND AUTHORITIES

The City of Oklahoma City, as a municipality of the State and an arm or department of the State Government, may rightfully exercise the general police powers of government. In addition to those general powers, the statutes of Oklahoma have specifically conferred certain powers, and it might be interesting to note some sections of the statute. Among other provisions we find Section 4562, C. O. S. 1921; Section 6395 O. S. 1931, regarding protection against fire, as follows:

> "4562. PROTECTION AGAINST FIRE. The council may regulate the construction of, and order the suppression of and cleaning of fireplaces, chimneys, stoves, stovepipes, ovens, boilers, kettles, forges or any apparatus used in any building, manufactory or business, which may be dangerous in causing or promoting fires, and prescribe limits within which no dangerous or obnoxious and offensive business may be carried on.
>
> "The council may also prescribe limits within which no buildings shall be constructed except of brick, stone or other incombustible material, with fireproof roof, and impose a penalty for the violation of such ordinance; and may cause buildings commenced, put up or removed into fire limits, in violation of such ordinance, to be removed or abated. * * *"

Other powers are given and duties prescribed by Section 4547, C. O. S. 1921, Section 6380 O. S. 1931, under the head of "General Powers" of the city, said section being as follows:

> "4547. GENERAL POWERS. The mayor and council shall have the care, management and control of the city and its finances, and shall have power to enact, ordain, modify or repeal any and all ordinances not repugnant to the laws of the United States and the constitution and laws of this state, as they shall deem expedient and for the good government of the

city, the preservation of the peace and good order, the suppression of vice and immorality, and the benefit of trade and commerce, and the health of the inhabitants thereof, and such ordinances, rules and regulations as may be necessary to carry such power into effect. * * *"

The City of Oklahoma City exists under a charter form of government, and under the unanimous holdings of our courts the courts take judicial knowledge of the provisions of the City charter. We call attention to Section 1, Article I of the charter of the City of Oklahoma City, which provides, in defining the organization and powers of the City:

"Section 1. * * * And it shall have such other powers, rights, privileges, franchises and immunities as are granted and conferred by any other parts of this charter or by the constitution and laws of the State of Oklahoma."

Then in Section 3 of Article I of this charter, it is provided further:

"Section 3. GENERAL GRANT OF POWER. Said City shall also have all other powers that may hereafter be given it by the Constitution and the laws of this state; * * * and said City shall have power to enact and enforce all ordinances necessary to protect health, life and property and to prevent and summarily abate and remove nuisances and to preserve and enforce good government and order for the security of the city and its inhabitants, to protect the lives, health and property of the city; and to enact and enforce all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the general laws of this state, the State Constitution or this charter."

Thus we see that the City does have all powers conferred upon cities under the general laws of the State, as well as the express

powers given it by the provisions of the charter, neither being exclusive, and the charter powers being in no way inconsistent with the powers conferred by the statutes.

Section 21 of Ordinance No. 3944, which is under attack here, is a portion of the comprehensive drilling ordinance passed by the City as an amendment to the zoning ordinances of the City. The State Legislature in 1923 passed a law specifically authorizing cities to make zoning regulations. This statute is Chapter 178, 1923 Session Laws, Sections 6170-6179, O. S. 1931. We call particular attention to the following sections:

> "6170. MUNICIPAL CORPORATIONS—POWER TO REGULATE BUILDINGS. For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."
>
> "6171. DISTRICTS—REGULATIONS AND RESTRICTIONS TO BE UNIFORM—TELEPHONE EXCHANGES EXCEPTED. For any or all of said purposes, the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this Act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in the other districts. Nothing in this section shall be construed, to apply to telephone exchange buildings."
>
> "6172. REGULATIONS—PLANS. Such regulations shall be

made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air, to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

"6178. VIOLATIONS OF ACT MAY BE ENJOINED. In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained or any building structure or land is used in violation of this Act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, or any other persons affected thereby, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the unlawful occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises."

"6179. EFFECT OF CONFLICTING ORDINANCES—RAILWAYS EXCEPTED FROM ACT. Wherever the regulations under authority of this Act require a greater width or size of yards, courts or other open spaces, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this Act shall govern. * * *"

We call attention to these sections of the statutes of the State and the provisions of the charter of the City of Oklahoma City in order that the Court may be advised as to the general statutory and

charter provisions. However, we do not understand that the appellants question the power of the City to make these regulations generally, with reference to the drilling of oil wells, within the City limits.

We note the statement in the plaintiffs' petition, as called attention to in the last paragraph on page 5 of the appellants' brief, wherein they allege that they were at all times "ready, willing and able to make and file with said appellee City, a bond conditioned as required by said ordinance, with good and sufficient personal sureties thereon." Thus, we now understand, and have understood throughout this case, that they do not question the right of the City to require a bond in the sum of $200,000.00, but only question the right of the City to require that the surety shall be a "bonding or indemnity company authorized to do business within the State of Oklahoma."

The appellants confine their arguments to one proposition, i. e. that this section of the City ordinance violates Section 1, Article 14 of the Constitution of the United States, Section 2, Article 2 of the Constitution of the State of Oklahoma, and Section 7, Article 2 of the Constitution of the State of Oklahoma, and is, therefore, void.

We have carefully read the appellants' brief filed herein and apparantely appellents rely upon the contention that the requirement of this ordinance, with reference to the surety on the bond, is an unreasonable exercise of the police power. Excerpts from 19 Ruling Case Law, "Municipal Corporations," pages 805 and 807, are

set out at pages 20 and 21 of the appellants' brief. We desire to quote the whole of Section 113, beginning at page 807 of this work, as a statement of what we understand to be the true rule as to the *determination of reasonableness* of laws and ordinances:

> "113. DETERMINATION OF REASONABLENESS. In determining what is reasonable, much must depend upon the requirements of different localities, the density of population of the town in which the ordinance has been enacted and the dangers and evils prevalent therein, and what would be reasonable in one place might be highly unreasonable in another. A municipal ordinance should not be looked upon by the courts with as much respect as the enactment of a co-ordinate department of the government of the state, but none the less a court should not strike down a municipal ordinance as unreasonable merely because it disagrees with the wisdom or expediency of the ordinance or the policy which it reflects. It is well settled that when an ordinance is passed relating to a matter which is within the legislative power of the municipality, all presumptions are in favor of its validity, and when it is attacked the burden is on the party alleging its invalidity to establish that fact. Thus when the validity of an ordinance depends upon the existence of one or more facts at the time of the enactment thereof, the existence, and not the nonexistence, of the necessary facts to sustain the validity of the ordinance, should be presumed, in the absence of evidence to the contrary. So also a municipal ordinance will be presumed to be reasonable unless the contrary appears on its face or is established by evidence. If an ordinance is found to be partial and unequal in its operation as between different classes; if it is manifestly unjust; if it discloses bad faith; if it involves such oppressive or gratuitous interference with the rights of the citizen as can find no justification in the minds of reasonable men, the court might well say that the legislature never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense and in this sense only, that the question of unreasonableness can properly be regarded. An ordinance

is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."

From a careful reading of this section we find that the courts, in determining the reasonableness of an ordinance, apply certain rules. First, the court will study the conditions and requirements of the particular locality, having in mind that there is no definite rule as to reasonableness, and an ordinance unreasonable in one place might be reasonable in another. Second, the courts will not strike an ordinance down merely because it disagrees with the wisdom or expediency of the ordinance, or the policy which it reflects. Third, when an ordinance passed is within the legislative power of the municipality the court will indulge in all presumptions in favor of its validity. Fourth, the burden of establishing its invalidity is upon the one who attacks it. Fifth, it is only when the ordinance is found to be partial or unequal in its operation, manifestly unjust, or passed through bad faith, or when it can find no justification in the minds of reasonable men, that the court will hold the ordinance unreasonable.

We accept this as the true rule by which ordinances of this character should be measured, and having these rules in mind we maintain that the appellants have not sustained the burden upon them and that this ordinance should be sustained. It will be noted that there is no allegation or proof of either bad faith or fraud.

It will be interesting to note the cases cited on behalf of the ap-

pellants. At the outset, let us state that we do not question, nor disagree, with the rule as stated in most of these cases, however, they can, without exception, be distinguished as not applicable to the case at bar.

Dobbins v. *Los Angeles*, 195 U. S. 223, 25 S. Ct. Rep. 18, 49 L. Ed. 169, is first relied upon. We submit that this case has no application to the case at bar, and we note where the court specifically found that the ordinance "was not demanded by the public welfare," and that it was not passed as an exercise of the police power in the interest of the public, but had for its object the destruction of the plaintiff's rights and the building up of another company. We quote from the court's finding as follows:

> "* * * No reasonable explanation for the arbitrary exercise of power in the case is suggested. The narrowing of the limits within which the plaintiff in error, in compliance with the ordinance of the city and the permit of the board of fire commissioners, was proceeding to erect the gasworks, to the smaller and more limited section, was not demanded by the public welfare, and, taking the facts as alleged in the bill, seems rather to have been actuated by the purpose to exclude the plaintiff in error from further prosecution of the enterprise. The limits of the privileged district were fixed late in August. In September the complainant began the construction of the works. In November, without changed conditions or adequate reason, the council, by an amended ordinance, draw a line embracing a part of the district including the complainant's property, and declare that, too, shall be prohibited territory. This action is strongly corroborative of the allegations of the bill that the purpose was not police regulation in the interest of the public, but the destruction of the plaintiff's rights, and the building up of another company still within the privileged district after the passage of the amendment * * *."

In *Lawton* v. *Steele*, 152 U. S. 133, 14 S. Ct. Rep. 499, 38 L. Ed. 385, the rule was stated by this Court and the ordinance upheld as a proper exercise of the police power.

To the same effect is *Walcher* v. *First Presbyterian Church at Norman*, 76 Okla. 9, 184 Pac. 106, where the court upheld the police power of the city in passing an ordinance for the regulation of laundries and prohibiting them within 150 feet of any church, school or hospital, saying (in the second syllabus):

> "It is not depriving one of his property without due process of law for a city, acting under its police and sanitary powers, to regulate by ordinance a business deleterious to public health, morals, safety or welfare of its inhabitants."

The court quotes from 19 Ruling Case Law, Section 112, the authority cited above, and says:

> "A court passing upon an ordinance of regulatory nature in deciding whether it is reasonable can take judicial notice of matters of common knowledge and of changing conditions in manner of living. * * * Consequently, we find that, under the present well-known conditions, it is within the police powers of a city, looking to the public health, safety, and welfare of its inhabitants, to pass such regulatory ordinances as the one in question, and that such an ordinance is not unreasonable, arbitrary, or discriminating."

The case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. Rep. 1064, 30 L. Ed. 220 is next cited. This case is probably cited more than any other as an example of arbitrary legislation passed to to single out and unjustly discriminate against a particular class of Chinese laundries. The court found that the ordinance in question had no relation to the public health, peace or safety, but was ar-

bitrary, unreasonable and directed against a particular class, the court saying:

> "* * * No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood; and while this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions.
>
> The fact of the discrimination is admitted.
>
> "No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution. * * *."

We do not question the authority, nor the application of the rule to that case, but we call attention to the fact there is no evidence that could, in any way, make it applicable to the case at bar.

Reagan v. *Trust Co.*, 154 U. S. 362, 14 S. Ct. Rep. 1047, ----------L. Ed.----------, is next cited, where the court, in an exhaustive opinion on the question of rates, upholds the exercise of the police power.

Hopkins v. *Richmond*, 117 Va. 692, 86 S. E. 139, is next cited. In this case the court upholds the provisions of the law for segregation of races within the City of Richmond as a proper exercise of the police power.

City of Baltimore v. *Radecke*, 49 Md. 217, is next cited. This case, while upholding the general police power, held the particular ordinance bad because it gave the mayor an absolute right to prohibit the use of steam engines within the city after notice, without any fixed rules or regulations, and thus gave him an arbitrary power, not to regulate but to prohibit. The case has no bearing upon the issue involved in the case at bar.

Appellants next cite *Holden* v. *Hardy*, 169 U. S. 366, 18 S. Ct. Rep. 383, 42 L. Ed. 780. In this case the court upheld the police power in limiting labor in mines to 8 hours per day.

Ex parte Throop, 145 Pac. 1029, 169 Cal. 93, is next cited. In this case the court found that it was "plainly manifest that the attempted regulation of the business conducted by the petitioner has no relation to the ends for which the police powers exist namely to protect the public health, comfort, safety or welfare."

The appellants next cite *Pa. Coal Co.* v. *Mahon*, 260 U. S. 393, 43 S. Ct. Rep. 158, 67 L. Ed. 322, where the court determined under the peculiar circumstances of the case, that the law went beyond the limits of lawful regulation. It bears no relation to the present case, although recognizing the proper exercise of police power.

Nectow v. *City of Cambridge, et al.* 277 U. S. 183, 48 S. Ct. Rep. 447, 72 L. Ed. 842, is next cited. In this case the ordinance put the plaintiff's property in the residence zone. He objected and the court held that the provisions of the ordinance did not promote

health, safety or the general welfare and bore no relation to them, and being deterimental to the plaintiff was set aside. The court however upheld the general police powers, and cited with approval the case of *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. Rep. 114, 71 L. Ed. 303.

Abbey Land and Imp. Co. v. *San Mateo,* 167 Cal. 434, 139 Pac. 1068, is next cited. This was the case of an ordinance restricting the number of crematories within a certain area, and was held bad, the court saying:

> "(6) The neighborhood in which plaintiffs propose to erect and maintain a crematory is not of a character that requires its suppression or prohibition, even if it were inherently as injurious to public health or convenience as a cemetery. Four other cemeteries adjoin that of plaintiffs on its westerly side, and three more, among them the Cypress Lawn Cemetery, aforesaid, are in close proximity. There are few dwellings in the immediate vicinity and no buildings devoted to any business, except that of burying the dead. It is entirely clear that the operation of another crematory in that vicinity will be in no wise injurious to the public health, comfort, or convenience, and that it will not injure adjacent property. * * *
>
> "It is conceded, of course, that if a crematory is, or may be, operated in a manner which may cause injury to the public health, comfort, or convenience, the local legislative authority may make reasonable regulations of the manner of conducting it so as to decrease or prevent such injury. But considering its location, it cannot be claimed that this crematory cannot be conducted without public injury, nor that if erected and carried on in the usual way, or in the manner proposed by plaintiffs, it will constitute a public nuisance, or cause public injury. It is only when the public health, safety, convenience, or welfare is or may be jeopardized that the police power may be invoked for its protection by restriction or regulation of the private rights of persons and property. * * *"

Continental Oil Co. v. *City of Twin Falls* (Idaho) 286 Pac. 353, is next cited. While upholding the police power of the city, the court found, under all the facts and circumstances, that the ordinance was not a reasonable regulation, and in addition that it was discriminatory in that it did not apply to all business of the same class. Certainly there can be no question about the correctness of the rule and its application to that case.

The same is true of the next case cited—*Youngstown* v. *Kahn*, 112 Ohio State 654, 148 N. E. 842, 43 A. L. R. 662. The court found that the ordinance had "no relation to the public health, safety, morals and welfare and falls outside of the inherent police power of the municipality," saying, however:

> "A positive prohibition is imposed by the ordinance upon the erection of an apartment house upon residence territory within the district. Thus the owner is substantially deprived of the use of his property. If this deprivation is reasonably imposed to prevent the use of the property for any purpose directly detrimental to the public health, morals, or safety, such a restriction does not legally constitute a taking of property without compensation and without due process. This is true, for the reason that all property is held subject to the police power of the state, and the state has the inherent right to prevent a citizen from using his property in a way which is harmful to the public health, safety, or morals. 6 R. C. L. 201."

To the same effect is *Village of Terrace Park* v. *Errett*, 12 Fed. (2d) 240.

In Re Gribben, 5 Okla. 379, 47 Pac. 1074, and *People* v. *Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, are also cited, in which cases the court found that the ordinances were not

authorized by statute and were, therefore, beyond the power of the City to pass.

While we have shown that the ordinance in the case at bar was specifically authorized, both by the statutes of the State and the City charter, we understand that the authority of the City to legislate in the matter of regulating the drilling of oil wells is not even questioned by the appellants.

Re John Kelso, 147 Calif. 609, 82 Pac. 241, is a case in which the court held the ordinance bad because of an absolute prohibition against the use of the plaintiff's land for a quarry, depriving him of the right to get the stone from quarries upon the land. By reason of the peculiar facts and conditions the court held this to be unreasonable although it upheld the general power of the state to regulate the use of the land under the police power.

Pacific Palisades Association v. *City of Huntington Beach,* (Cal.) 237 Pac. 538, is next cited. In this case the sole question was whether the prohibition against the use of the land was arbitrary or reasonable, based upon the fair exercise of the police power. Under the peculiar facts of the case the court held that the ordinance went beyond the police power of the city, saying, however:

> " * * * While the use to which one may put his property may be restricted or regulated by the state in the exercise of its police power, so far as it may be necessary to protect others from injury from such use, it is elementary that the enjoyment of the property cannot be interferred with or limited arbitrarily. *In re Kelso,* 147 Cal. 609, 611, 82 Pac. 241, 21 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178. It must be taken as very def-

initely settled in this state that the right to zone may be resorted too by municipalities upon a proper invocation of the police power. *Miller* v. *Board of Public Works* (Cal. Sup.) 234 Pac. 381; *Zahn* v. *Board of Public Works* (Cal.) 234 Pac. 388. But such zoning must be reasonably necessary and reasonably related to the health, safety, morals, or general welfare of the community. A municipality is not permitted under the guise of regulating business and segregating it to a particular district, to grant a monopoly to business establishments and enterprises already situated in unrestricted districts. *In re White* (Cal. Sup.) 234 Pac. 396. The City of Huntington Beach has the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing. *Ex parte Hadacheck*, 165 Cal. 416, 420, 132 Pac. 584, L. R. A. 1916B, 1248. Ordinances having effect must be reasonable, and must be for the purpose of protecting the public health, comfort, safety, or welfare. Every intendment is to be made in favor of the lawful exercise of municipal power making such regulations, and it is not the province of courts, except in clear cases, to interfere with the exercise of that authority. * * *."

City of North Muskegon v. *Miller*, 249 Mich. 52, 227 N. W. 743, is next cited. While this case held certain provisions of the zoning ordinance bad as unreasonable and invalid, it upheld the oil drilling ordinance, saying:

"It seems unfortunate that if there is oil under this marshy land, it should not be made use of both for the benefit of plaintiff, as well as defendants. However, this is a matter which is purely administrative, and it is not within our province to regulate the action of the city officials when they act within their legal rights. We find the zoning ordinance illegal and void as to the particular section of the city in which this property is situated. We find the drilling ordinance both legal and reasonable, and in this instance the city council had a right to refuse the giving of a permit."

At page 49 of appellants' brief they cite *State of Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 49 S. Ct. Rep. 50, 73 L. Ed. 210. In this case a city ordinance restricted the location of a home for the aged poor within a certain territory without the consent of the owners of two-thirds of the property within 400 feet of the proposed building. The court held that from the particular local conditions this restriction had no relation to the police power and that the delegation of the right to the property owners in that vicinity to use arbitrary powers was bad. This is shown from the portion of the case quoted in the appellants' brief. The case is, therefore, not in point.

Thus it will be seen that in these cases relied upon by the appellants, where statutes and ordinances have been held bad, that they were either clearly unreasonably, arbitrary or passed without any relation to health, safety or public welfare under the valid exercise of the police power, and, as stated before, we do not disagree with the rule as laid down by these cases, but only in its application. Cases without number could be cited where the exercise of the police power is upheld.

As was said by the court in the *Youngstown case, supra*:

> "There is no difficulty in stating these principles. The difficulty arises in fitting these conceded principles to the facts before us."

In addition to the above we desire to quote briefly the following cases for statements as to the general exercise of the police power and the rights of legislative bodies in the exercise thereof.

See *Magnolia Petroleum Co.* v. *Wright*, 124 Okla. 55, 254 Pac. 41, where the court, in discussing an ordinance passed under the authority of the police power, said:

> "* * * Courts should be very cautious in declaring a municipal ordinance unreasonable; there being a peculiar propriety in permitting the inhabitants of a municipality to determine what rules are necessary for their own local government. *City of Tacoma* v. *Keisel*, 68 Wash. 685, 124 Pac. 137, 40 L. R. A. (N. S.) 757. It is democratic that each city or community should so far as practicable, determine its own standard of quietude and other conditions under the police power. This may vary in different communities. We do not deem the ordinance in question invalid as being unreasonable."

See also *Ex parte Tindall*, 102 Okla. 192, 229 Pac. 125, where the court in discussing the police power and its exercise, says (p. 130 Pacific Reporter):

> "(7) While the term 'police power' has never been specifically defined nor its boundaries definitely fixed, yet it may be correctly said to be an essential attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal.
>
> "It may also be equally well said that its limitations are plastic in their nature and will expand to meet the actual requirements of an advancing civilization and adjust themselves to the necessities of our multiplying complexities in moral, sanitary, economic and political conditions. See R. C. L. pp. 187-197; 8 Cyc 863-876, 889-900, and authorities cited *supra*. No principle in our system of government will limit the right of government to respond to public needs and protect the public weal.
>
> "'The Fourteenth Amendment to the Constitution of the United State does not interfere with the proper exercise of

the police power of the several states.' 6 R. C. L. 194, p. 197 —citing more than a dozen decisions from the Supreme Court of the United States and numerous decisions from the Supreme Courts of various states. See also, authorities above cited in Cyc, C. J., and Black's Const. Law."

We quote from the case of *C. C. Julian Oil & Royalties Company* v. *Capshaw*, 145 Okla. 237, 292 Pac. 841, as follows:

"(3) Statutes such as those under consideration are based largely on the police power of the state; and while this power is more or less elusive and difficult to define, this difficulty results largely from the fact that it (the police power) is plastic in its nature and accommodates itself to every change of conditions which call for its application. Its nature and scope is well stated in R. C. L. Sec. 182, as follows:

' "The police power is an attribute of sovereignty possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written constitution. It has been said that the very existence of government depends on it, as well as the security of social order, the life and health of the citizen, and the enjoyment of private and social life and the beneficial use of property. It has been described as the most essential, at times the most insistent, and always one of the least limitable of the powers of government.'

"The court in *Ex parte Tindall*, 102 Okla. 192, 229 Pac. 125, 126, in the sixth syllabus said:

" 'The police power is an attribute of sovereignty, inherent in every sovereign state, and not derived from any written Constitution nor vested by grant of any superior power.'

" 'The term "police power" comprehends the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal and protection of the public interests.

" 'It is plastic in its nature, and will expand to meet the ac-

tual requirements of an advancing civilization and adjust itself to the necessities of moral, sanity, economic, and political conditions.

" 'No principle in our system of government will limit the right of government to respond to public needs and protect the public welfare.'

"In this connection it cannot be disputed that the production of petroleum and its various products is one of the major industries of this state, and one in which many of its citizens are vitally concerned. The almost universal use of oil, gasoline, and other petroleum products, together with the fact that a major portion of the revenues to support our educational and eleemosynary institutions and other departments of state government is derived from taxes levied upon this industry, makes the conservation of this great natural resource a matter of grave concern to the state and every citizen thereof. Notwithstanding the magnitude and importance of the oil industry, it is one of the natural resources which is peculiarly susceptible to waste and dissipation, and when it once escapes can never be recovered.

* * * * * *

"In the case of *Marrs* v. *City of Oxford*, 24 F. (2d) 541, the Federal District Court upheld a city ordinance in the state of Kansas regulating the drilling upon town lots, and among others things held that oil and gas, while in the earth, were susceptible of only a qualified ownership (which is the rule adopted in this state, *Rich* v. *Doneghey*, 71 Okla. 204, 177 Pac. 86, 3 A. L. R. 252); but even if it be property in the strict sense, the right of a landowner to produce same is subject to the police power of the state, and that the owner must use this property so that he will not injure another, and that where the provisions of the ordinance were generally reasonable it would not be held invalid because better or more scientific provisions might be suggested. This case was affirmed on appeal. See (C. C. A.) 32 F. (2d) 134, 67 A. L. R. 1336 and petition for *writ of certiorari* was denied by the Supreme Court of the United States. See 280 U. S. 573, 50 S. Ct. 29, 74 L. Ed. 625."

We call the Court's attention to the recent case of *Marblehead Land Company* v. *City of Los Angeles*, 47 Fed. (2d) 528, where at pages 532-33 the Court said:

> "(3-5) The legislative body entrusted with the police power has a wide discretion which cannot be interfered with by the courts. Their laws or ordinances enacted in pursuance of the police power are invested with a strong presumption of validity. If the question as to whether or not the legislation is unreasonable or arbitrary or an unequal exercise of power is fairly debatable, the legislation must be upheld as valid.
>
> "(6-7). * * * The city council presumptively acted upon the theory that such a hazard was real and substantial * * *. In this connection it should be observed that, in passing up the conclusions of the trial court or the local legislative body, the appellate court should give great weight to the determination of local authorities and the local courts especially familiar as they are, with local conditions."

We quote from *Bandini Petroleum Co.* v. *Superior Court*, (Cal.) 293 Pac. 899 at 905, where the court, in quoting from earlier cases, said:

> " 'The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals.' *Ex parte Drexel*, 147 Cal. 766, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878. It is settled law that all property is held subject to the exercise of police power, and that provisions of the Constitution declaring that property shall not be taken without due process of law have no application in such cases. *Odd Fellows' Cem. Ass'n.* v. *San Francisco*, 140 Cal. 230, 73 Pac. 987."

See *also Tanner* v. *Little*, 240 U. S. 369, 36 S. Ct. Rep. 379, where this Court, speaking through Mr. Justice McKenna, said:

"The police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests."

Zoning ordinances have been upheld in most all states, including Oklahoma, following the cases of *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. Rep. 114, 71 L. Ed. 303, 54 A. L. R. 1016; *In re Dawson*, 136 Okla. 113, 277 Pac. 226; *Zahn et al.*, v. *Board of Public Works, et al.*, 195 Cal. 497, 234 Pac. 388.

Acting under the authority of the Act of 1923, Sections 6170, 6171, 6172, 6178 and 6179 O. S. 1931, *supra*, the City of Oklahoma City passed a comprehensive zoning ordinance, of which ordinance No. 3944 is an amendment. Under the general zoning ordinance every lot and parcel of ground within the City is classified for a particular use. The U-7 Zone was created and the drilling of wells for oil and gas was permitted therein, but "to secure safety from fire, panic and other dangers", as contemplated by the 1923 Act, and "to promote the general welfare" of its citizens certain regulations were prescribed, which should be complied with. These regulations are detailed in Ordinance No. 3944, attached as an exhibit to the record herein, and provided not only for the giving of a bond conditioned as provided, but also for the character of fittings and valves, boilers, distances between and the sizes of storage tanks, distances for the locations of wells from property lines, protection of the streets, protection of water courses, from which water was secured for domestic use, and numerous other requirements more specifically detailed therein.

This brief outline of the zoning ordinances shows that the municipality has enacted its regulations with the view to obtaining the most appropriate use of property consistent with the public safety and welfare. As heretofore stated, Block 9, Mead's Addition, is wholly within the U-7 or oil drilling zone of the City, where the recovery of oil and gas is expressly permitted.

The Court will thus see that there is no prohibition in the ordinance against the use of this property for the recovery of oil and gas as may lie beneath its surface. This clearly distinguishes this case from the cases urged by appellants in their brief and relied upon by them.

It will be seen that in the Dobbins case there was an absolute prohibition against the desired use of the property. Likewise, in the Throop case the city ordinance absolutely prohibited the operation of a stone crusher. In the Mahon case the court held that there was an absolute prohibition against the desired use, and likewise in the Nectow case.

The ordinance in controversy here is entirely different from the ordinances involved in those cases, in that the desired use of this particular property is permitted by the ordinance but there is attached to such permission conditions which the ordinance imposes looking to the safety and general welfare of the inhabitants of the City. One of these conditions is the requirement of a bond. It is the contention of the City that under the general grant of the police power, and particularly under the Act of 1923, *supra*, the City might impose any condition which would have a natural ten-

dency to promote the safety and welfare of the inhabitants of the City.

The court takes judicial notice of the fact that drilling of wells for oil and gas constitutes a hazard. As was said by the court in *Marrs* v. *City of Oxford*, 24 Fed. (2d) 541:

> "Common knowledge teaches that a slender derrick, 75 to 80 feet in height, is of some danger to surrounding buildings in case of a windstorm; there is a fire hazard connected with the production of oil and gas in immediate proximity to boilers, a hazard which is reflected by the public records of this state, which disclose heavy additional fire insurance rates on any structure within 50 feet of a drilling oil well; there is a discomfort to neighbors in the necessary noise attendant upon day and night drilling; allegations to the contrary are but conclusions, and may be disregarded."

The court will take judicial cognizance of all matters of general knowledge; see *Mueller* v. *Oregon*, 208 U. S. 412, 28 Sup. Ct. Rep. 324; of things affecting the public health; see *Leavy* v. *U. S.* 177 U. S. 621; of the disastrous effect of a forest fire; see *Koneszny* v. *Detroit Railway* Co., 128 N. W. 1096; of noises and disturbances caused by the operation of automobiles; *Magnolia Petroleum Co.* v. *Wright*, 124 Okla. 55, 254 Pac. 41, and of the dangers and hazards of oil drilling, *Gant* v. *Oklahoma City*, 150 Okla. 86; 6 Pac. (2nd) 1065.

Appellants, at pages 41 to 47, cite the cases of:

Harrigan & Reed Co. v. *Frank Burton, et al.*, 224 Mich. 564, 195 N. W. 60, 33 A. L. R. 142.

Geo. Bolln Co. v. *North Platt Valley Irrigation Co.*, 19 Wyo. 542, 121 Pac. 22,

for authorities against the requirement of a bond. If these cases are urged as authority against the right of the city to make provisions for bonds in a case like the case at bar, they would be rare exceptions and decidedly in the minority, for there runs through the cases which we cite the admitted authority for a bond requirement. However, a study of these particular cases will show that the statutes involved were declared invalid by reason of their unusual and peculiar provisions.

In the Geo. Bolln Co. case the legislative enactment was an effort to provide additional remedies growing out of contractual obligations. The holding of the case has no bearing on the requirements of the ordinance involved in the case at bar, where the reason for its enactment is an effort on the part of the municipality to conserve the safety, health and general welfare of the community.

In the Harrigan case the objection to the statute is well pointed out in the portion of the opinion quoted by appellants in their brief, where the court says that this was an effort "under the guise of police regulation" to arbitrarily and unreasonably interfere with the constitutional rights of the private citizen to pursue a lawful business or calling and to make contracts with others in relation thereto. It will be noted that the requirement for a bond was for the benefit of those with whom the principal on the bond dealt under private contract. In the case at bar the requirement for a bond is for the protection of the citizens of the community, who are helpless to protect themselves, against the hazards of drilling, if the city permits the drilling for oil and gas. The case is clearly distinguishable upon this ground.

Appellants cite, at page 48 of their brief, *Jitney Bus Association* v. *Wilkes-Barr,* 256 Pa. 462, 100 Atl. 954. This was evidently a case of first impression by the Pennsylvania Court, as no authorities were cited in the opinion. The case is decidedly in the minority as we shall see by a study of the authorities.

With reference to the reasonableness of the ordinance requirement that the bond be furnished by a surety company authorized to do business within the State of Oklahoma, we call the Court's attention to the following cases:

Lutz v. *City of New Orleans,* 235 Fed. 978;
Smallwood v. *Jeter,* 42 Ida. 169, 244 Pac. 149;
Hadfield v. *Lundin,* 98 Wash. 657, 168 Pac. 516;
State v. *Seattle Taxi Co.,* (Wash.) 156 Pac. 837, 90 Wash. 416;
Ex parte Cardinal (Calif.) 150 Pac. 348;
Dickey v. *Davis* (W. Va.) 85 S. E. 781;
In re Opinion of the Justices (N. H.) 129 Atl. 117;
Italia Amer. Shipping Corp. v. *Nelson,* 323 Ill. 427; 154 N. E. 198;
Ferguson-Hendrix Co. v *Fidelity & Deposit Co.,* 79 Wash. 528, 140 Pac. 700;
State v. *Somnelson* (Wisc.) 111 N. W. 712;
John Rissman & Son v. *Industrial Commission* (Ill.) 154 N. E. 198;
Auto Transit Co. v. *Fort Worth* (Tex.) 182 S. W. 685;
New Orleans v. *LeBlanc,* 139 La. 113, 71 So. 248.

In the Lutz case, *supra,* the City of New Orleans by ordinance required, as a condition for the operation of taxicabs upon its streets, the execution of a surety bond, conditioned as required by Ordinance No. 3944 herein. The same attack was made upon that

ordinance as in this case, and the court upheld the requirement, saying:

"* * * Considering the financial irresponsibility of plaintiffs alleged in the bill and the dangerous nature of the business as shown by the tabulated statement of accidents filed, the requirement of a bond to indemnify passengers and others who may be injured by the carelessness of the jitney operator is well in line with other statutes for the protection of passengers such as those referred to. Aside from these considerations the city contends for the validity of the ordinance as an exercise of its police power. In answer it is urged by the plaintiffs that the giving of bond would not tend to promote the safety of either the passengers or the public. The same objection was urged with regard to the Federal Employers Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, Sections 8657-8665]), but the Supreme Court held that any measure that would impel the carrier to avoid or prevent negligent acts would be a proper regulation of commerce. See Second Employers' Liability Cases, 223 U. S. pp. 50 51, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The same reasoning applies here. There can be no doubt that the safe operation of an automobile depends largely on the caution, skill and responsibility of its driver. Any measure that will tend to secure careful, competent men as drivers of jitneys will promote the safety of passengers and the general public. It is at once apparent that the requirement of a bond would have this effect. No one would be willing to become surety for a reckless or incompetent driver, and the fact that he was under bond, with his responsibility fixed would, of itself make the driver more careful. It would appear therefore, that the city could properly require the giving of a bond in the reasonable exercise of its police power.

"(7) Does the requirement that the bond be signed by a surety company violate plaintiff's liberty of contract? Assuredly not. It is shown that a number of surety companies are authorized to do business in the state. It is not shown they exact exorbitant fees, or that the plaintiffs could procure personal surety on a better basis or at all. The only reason plaintiffs

cannot procure the surety bonds in compliance with the ordinance is because they cannot deposit cash or collateral equal to the amount of the bond. Personal surety might make the same requirement. In any event the contrary is neither alleged or proved. Considering the greater desirability of corporate surety in any case, a superiority sometimes recognized by the law itself (see Bankrupt Act [Act July 1, 1898, c. 541, Sec. 50, 30 Stat. 558 (Comp. St. 1913, Sec. 9634)] bonds of trustees and referees), it can hardly be said that the provision that the bond must be signed by a surety company is more onerous than would be a requirement of personal surety of equal responsibility."

Note also the statement of the court in the Smallwood case, *supra*:

"(14) It would serve no useful purpose to discuss at length the power of the Legislature to limit the carrier to furnishing bonds of surety or insurance companies only. Modern experience has brought into existence the surety and bonding companies for almost unlimited purposes. The results of loss to insured persons through other than surety bonds, and the power of the state to control, and the regulations adopted for the purpose of control of, bonding and insurance companies, with the resulting security to the insured, are persuasive reasons supporting the wisdom of the Legislature, if it sees fit, to require that a bond be given by such insurance or bonding company. The power to require a bond necessarily implies the power to establish the qualifications of the bondsman. The requirement violates no constitutional right of plaintiff."

We quote from *State* v. *Somnelson*, *supra*, as follows:

"Our attention is called to *State of Ohio ex rel.* v. *Robins*, 71 Ohio St. 273, holding that a law requiring official bonds to be obtained of surety companies is unconstitutional as a restriction upon the liberty to contract. The case is quite novel and seems to stand alone, and rests upon reasoning which we are not willing to follow. It is not suggested that such a law violates any express provision of the Constitution but rather

that it violates the spirit thereof as contained in some general declarations referred to. It is not perceived why it is not within the scope of legislative authority, especially with regard to an office created by the legislature, to provide that the official bond of the officer elected or appointed to fill the office shall be by a surety company and at public expense."

See *Ferguson-Hendrix Company* v. *Fidelity and Deposit Company*, *supra*, We quote from the opinion as follows:

"(1) The appellant first contends that the act is unconstitutional, in that the bond is required to be executed by a surety company authorized to do business in the state, thus denying it the right to deposit money or to give personal security. We cannot yield our assent to this view. In *State ex rel. Beck* v. *Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. Rep. 681, a similar act was sustained. * * * The court, in a carefully considered opinion, said that the wisdom of the act was a legislative question; that the measure was a lawful regulation for the public good, a legitimate exercise of the police power of the state; that it was not class legislation; but that, on the contrary, it was framed to meet 'the crying evils which it was believed had grown up with this branch of business.' In *Clark's Estate*, 195 Pa. 520, 46 Atl. 127, 49 L. R. A. 587, the court sustained the contitutionality of an act authorizing a receiver, guardian, trustee, executor, or administrator, etc., required by law or order of the court to give bond as such, to include as an expense in the execution of the trust such reasonable sum as he may have paid to a surety company for becoming his surety, to be allowed by the court in which he was required to account. The court observed that there was a material difference between the qualities of the insurance afforded by indemnity companies and a private individual, who was usually the relative or friend of the principal or a 'professional bail-goer,' without responsibility. It is well known that lapse of time fluctuation in values of property, the uncertainty of human life, and the risk of a dishonest surety often render personal security inadequate when called upon to meet its promised responsibility These were doubtless some of the reasons which influenced the

legislature in requiring that the bond be executed by a surety company authorized to do business in this state.

"(2) The appellant relies upon *State ex rel.* v. *Robins*, 71 Ohio St. 273, 73 N. E. 470, 69 L. R. A. 427, 2 Ann. Cas. 485, where a statute requiring a similar bond was held to be in contravention of the Bill of Rights, in that it was an unconstitutional restriction upon the liberty to contract, and that it denied 'equal protection and benefit' in violation of the Constitution. It was conceded that the law was valid if the public welfare justified or required it; but it was argued that the surety bond does not increase the protection of the obligee. It was said:

" 'We have not been advised of any necessity for, or general demand for, the abolition of personal security and the substitution therefor of corporate security, and the reasons which we have given persuade us that the public welfare does not require it.' It was further remarked that it was evident to the court that it would be more economical for the public to become its own insurer of the good faith of its officials, which would result perhaps in no official bond in any case. We had supposed that under the Constitution the question as to whether the public welfare justified or required the state to exert its police power was a legislative question, and that ordinarily courts would not thwart the legislative will, if any reason existed or could be suggested for the exercise of the power. It is certain that personal sureties have frequently failed to respond to their obligations, and we must assume that the Legislature knew this fact and considered that the character of land under review would afford a safer and hence a better security to those who would be its beneficiaries. It would seem that the power to exact the security would include the right to determine the character and sufficiency of the security; that the greater power would include the lesser power. The presumption always obtains that a legislative act is constitutional, and it will only be held unconstitutional where it so plainly appears to be so as to free the mind from reasonable doubt. Guided by these principles, and for the reasons suggested, we are constrained to hold the law a valid exercise of the police power of the state."

See also *State* v. *Walter Bowen & Co.*, 86 Wash. 23, 149 Pac.

330, where the court, having the same question before it, held the bond requirement good. We quote from the syllabus:

> "1. Questions of the wisdom, necessity, and policy of law are solely for the Legislature, and if the Legislature proceeds regularly, violating no constitutional restriction, questions as to the necessity and policy of the law are conclusively determined in favor of the statute, if any state of facts could exist which would justify it."
>
> "3. Every presumption is in favor of the validity of a statute, and, until the contrary is shown beyond a reasonable doubt, a statute enacted in the exercise of the police power will not be overturned."

We quote also from the opinion as follows:

> "(5) Appellant insists that the requirement of the law, in order to obtain a license, that a surety company bond in the sum $3,000 be furnished, is an unreasonable and invalid requirement. It insists, also, that it is impossible of performance. The last contention is undoubtedly merely a conclusion or statement of opinion. We have heretfore held, in the case of *Ferguson-Hendrix Co.* v. *Fidelity & Deposit Co.*, 79 Wash. 528, 140 Pac. 700, that the provision of the law requiring such bond in order to obtain a license is a valid exercise of the police power of the state. It is urged however, that that question was not involved and was not proper to be decided in that case. *State ex rel. McKell* v. *Robins*, 71 Ohio St. 273, 73 N. E. 470, 69 L. R. A. 427, 2 Ann. Cas. 485, where a similar statute in Ohio was not sustained, is cited in support of appellant's contention. We cannot give our assent to the reasoning or the conclusion in that case: and, while it may be true that the validity of this section of the law was not involved in the Ferguson-Hendrix Case, *supra*, yet we adopt the reasoning in that case as supporting this provision of the law."

We see from these cases that it is almost universally held that the requirement of a bond does have a direct relation to the

promotion of the end to be reached by the exercise of the police power, and the requirement that such bond be executed by a surety company is in accord with practically all of the late decisions.

As was said in the case of *Mondou* v. *N. Y., N. H. & H. Ry. Co.*, 223 U. S. 1, 32 S. Ct. Rep. 169, in discussing the validity of certain acts of Congress making changes in the rules of liability of carriers:

> "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the basis of the right of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

Appellants complain that they were unable to comply with the requirements of the surety companies. Any surety, regardless of whether personal or corporate, if it affords any protection or strength to the bond, must necessarily require some proof of financial responsibility on the part of the principal. Counsel speaks of the possibility of obtaining personal surety, implying that the City, charged with the protection of its inhabitants, should assume a risk and accept a bond, which would not be considered good by a surety company, looking at it from a business standpoint. Surely the same persons if sufficiently interested to sign a bond, and if substantial and of any worth, should be able and willing to assist in procuring the bond for the principal from a surety company. Why should the City take all the risk? The evidence further showed that

these bonding companies take into consideration the moral risk, and it is a matter of common knowledge that there are numerous other things which they take into consideration which might enable one person to secure a bond over another, but these are matters over which the court has no control. The Court will take cognizance of the scores of bonding companies authorized to do business and operating within this state. The fact that one or more of them had shown their inability or unwillingness to make a bond, for reasons best known to themselves, is no evidence of the inability to secure a bond as required by the ordinance.

The real question in this case and the real underlying reason for the attack on the ordinance is disclosed by the testimony of the witness Knox L. Garvin, wherein he states that "We got as far as we could go with meeting the requirements of the City" (R. 59), and answered the following question:

"Q. And in your instance you think the main difficulty is because you are not able to qualify with a surety company that would write the bond, that that is why it operates to your detriment, don't you?

A. Yes, sir."

That this is not sufficient reason for holding the ordinance invalid has been determined time and time again not only by the courts of the various states but by the Supreme Court of the United States. *Hadfield* v. *Linden, supra; Ex parte Cardinal, supra, Dickie* v. *Davis, supra; Lutz* v. *New Orleans, supra; Packard* v. *Banton,* 264 U. S. 140.

"If as asserted the appellant is now unable to meet its re-

quirements because the character of the bond required by the act cannot be secured then he is not entitled to the privilege which the state grants, and this simply because the grant was conditioned upon a meeting of those requirements."

Hadfield v. *Linden, supra.*

"The fact that because of circumstances peculiar to him the appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne or excessive in itself does not militate against the constitutionality of the statute."

Packard v. *Banton,* 264 U. S. 140, 44 S. Ct. 257.

That there is difficulty in complying with the terms of an ordinance is not sufficient grounds for setting the ordinance aside, as was held in the recent case of *Standard Oil Co.* v. *City of Marysville,* 279 U. S. 582, 49 S. Ct. Rep. 430, where the court said:

"We may not test in the balance of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome." (Citing cases.).

See to the same effect *Hodge Drive It Yourself Company* v. *Cincinnatti,* 123 Ohio State, 284, 175 N. E. 196; 77 A. L. R. 889, where it was said:

"The fact, if it be a fact, that the peculiar circumstances of the plaintiffs are such that because thereof they have not the ability to comply with the provisions of the ordinance as to bond, does not militate against the validity of the ordinance so long as they have the same opportunity to comply with the ordinance that other members of the class have and the ordinance has for its reasonable purpose the preservation of the public safety, health, and welfare. *Auto Transit Co.* v. *City of Fort Worth* (Tex. Civ. App.) 182 S. W. 685; *Puget Sound*

Traction, Light & Power Co. v. *Grassmeyer,* 102 Wash. 482, 173 Pac. 504, L. R. A. 1918F, 469; *Hadfield* v. *Ludin, Pros. Atty.* 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942."

This case was affirmed in the U. S. Supreme Court January 4, 1932, 284 U. S. 335, 52 Supreme Court Rep. 144.

Does the inability to meet the requirements of the surety companies in itself establish the unreasonableness of the ordinance? Assuredly not. The rates to be charged by those companies are subject to the supervision and control of the state: there is no indication any effort has been made to have such requirement modified by the proper board of the state, nor is there any complaint in this record that such requirements upon the part of the surety companies are unreasonable—that such companies should carry the risk without indemnification upon the part of the assured, or that the amount of indemnity required is at all out of proportion with the risk. The only complaint is that these appellants cannot meet such requirements.

It is further urged that the surety companies might impose such conditions upon applicants for bonds that drilling would be absolutely prohibited because of such conditions. However:

> "One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval."
>
> *Lehon* v. *City of Atlanta,* 242 U. S. 53, 37 S. Ct. 70.

There is a further contention urged by the appellees in the trial court which we believe to be controlling in this case.

The testimony and pleadings show that these appellants acting under the provisions of the 1923 Act, *supra* and of Ordinance 3944, and other sections of the zoning law, of which Ordinance No. 3944 is a part, in order to secure a permit to drill for oil and gas applied to the Building Commissioner of the City for such permit, and upon being refused a permit, appealed from such refusal to the Board of Adjustment, and submitted themselves to the jurisdiction of such Board, and to the provisions and requirements of the ordinances of the City and more particularly Ordinance No. 3944. After securing from the Board of Adjustment the right to secure a permit, which order is pleaded in their petition, they then attack, as unreasonable, one of the provisions of Ordinance No. 3944, the provision requiring the execution of the bond.

To permit such attack to be made is contrary to the rule of law governing estoppel. Appellants cannot avail themselves of the benefit of the statute and ordinance and then attack a portion thereof as unconstitutional.

We call the Court's attention to the case of *Ozones* v. *Corporation Commission*, 41 Fed. (2d) 799, where the plaintiff had made application for permits to build and operate gins under Section 3712 C. O. S. 1921, as amended by 1929 Session Laws, Chap. 240, Section 1, and, after receiving permits for several towns, attacked the constitutionality of the Act. Upon the plea of estoppel interposed by the defendants, which was sustained, the Court said:

> "One may not take advantage of law where it suits him and then attack it when it does not."

See also *Grand Rapids & I. R. Co.* v. *Osborn, Comr.*, 193 U. S. 17, 24 Sup. Ct. 310, where the Court said:

> "The railroad company, by incorporating under a general act, is estopped to contest the validity, under the federal constitution, of the provisions of that act regulating railroad rates, which formed one of the burdens attached by the statute to the privilege of becoming an incorporated body."

It could not be contended that the appellants did not receive benefits under this Act without contending that they had the inherent right to drill regardless of whether it was within the city limits and without regard to the City's right to regulate, and in spite of any regulatory requirements. Of course this contention could not be maintained.

It did not have such inherent right, and the permit to drill was only granted after an application was made to the Building Commissioner, and the Board of Adjustment, and an appeal from an adverse ruling of the Board to the District Court. This application was made under the ordinance and according to its terms, and when finally granted by the Board of Adjustment it was granted upon certain conditions contained in the ordinance, one of which was this requirement as to bond. Appellants contend that they have met all of the requirements of the ordinance except as to the bond. So we contend that the appellants applied for and secured the benefits of this ordinance and are now estopped from questioning the validity of the bond requirement, which was one of the burdens attached to the privilege of drilling for oil and gas within the city limits.

We call the Court's attention to the fact that this ordinance was first considered and passed by the City Council sitting as the legislative branch of the City government; that the ordinance was authorized by the statutes of the State of Oklahoma and the City Charter of Oklahoma City; that it was then attacked and upheld by the trial court, and then on two different appeals was upheld by the Supreme Court of the State of Oklahoma, and we now contend that its validity, thus established, is conclusive and binding on this point.

This is the effect of the holding of this Court in *Reinman* v. *City of Little Rock*, 237 U. S. 171, 35 Sup. Ct. Rep. 511. We quote from the opinion as follows:

> "The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purpose of our jurisdiction, as an act of legislation proceeding from the lawmaking power of the state; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution: and any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of Judicial Code, Section 237 (36 Stat. at L. 1156, Chap. 231, Comp. Stat. 1913, Sec. 1214), which confers jurisdiction upon this court *Atlantic Coast Line Ry. Co.* v. *Goldsboro*, 232 U. S. 548, 555, 58 L. ed. 721, 725, 34 Sup. Ct. Rep. 364, and cases cited."

See also *Thomas Cusack Co.* v. *City of Chicago*, 242 U. S. 526, 37 S. Ct. Rep. 190, 61 L. Ed. 472, L. R. A. 1918A:

> "(1) The decision of the highest court of a state that a certain municipal ordinance, challenged as repugnant to the Fed-

eral Constitution, is within the scope of the powers conferred by the state legislature upon a municipality, is conclusive upon the Federal Supreme Court on writ of error to the state court.

* * * * * *

"The Supreme Court of the State of Illinois sustained the validity of the ordinance in an opinion (267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916C 488) which declares that the act of the legislature of that state, passed in 1912 (Hurd's Stat. 1913, Chap. 24, Sec. 696), is a clear legislative declaration that the subject of billboard advertising shall be subject to municipal control.

"It is settled for this court by this decision that the ordinance assailed is within the scope of the power conferred on the City of Chicago by the legislature, that it is to be treated as proceeding from the lawmaking power of the state, and that, therefore, it is a valid ordinance unless the record shows it to be clearly unreasonable and arbitrary. *Reinman* v. *Little Rock*, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511."

See also *Armour* & *Co.* v. *State of North Dakota*, 240 U. S. 510, 36 S. Ct. Rep. 440, where the court, having under consideration a statute of the State of North Dakota, after the same had been upheld by the highest court of that State, and on passing upon its validity, said:

"The Supreme Court considered the statute as but a development of other laws passed in the exercise of the police power of the state to secure to its inhabitants pure food and honest weights, questions which the court thought were inseparably allied and any argument advanced upon one applies equally to the other.' And the court said the law was drafted by the Pure Food Commission, it might be reasonably assumed, 'after twelve years of observation and study,' and, further, that 'the expert who drafted the law, the legislature who passed it, and the governor who approved it, all thought necessity exist-

ed for such a measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief is founded upon the evidence in this case and upon facts of which this court can take judicial cognizance.'

"The court, by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not abitrary, we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however, strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws. *Rast* v. *Van Deman & L. Co. Tanner* v. *Little*, 240 U. S. 342, 60 L. ed.____, 36 Sup. St. Rep. 370, 379. It only remains to apply to the present case the principles so announced."

As heretofore stated herein, this appeal is from the decision of the Supreme Court of Oklahoma affirming the trial court's decision granting a permanent injunction. *Gant et al.* v. *Okla. City*, Reported in 15 Pac. (2d) 833. However, the identical question was passed upon by the Supreme Court of Oklahoma in its earlier opinion, passing upon the appeal from the trial court's order granting the City a temporary injunction. See *Gant* v. *Oklahoma City*, reported in 6 Pac. (2d) 1065.

Inasmuch as this earlier opinion of the Supreme Court deals much more fully with the issues involved, we desire to quote extensively from that opinion herein. A reading of that opinion will

disclose the fact that almost without exception the cases cited and relied upon by the appellants in their brief filed in this Court were relied upon and urged in their appeal before the Oklahoma Supreme Court, and that these cases were considered by that court and held either not to be applicable or not in point as affecting the validity of this particular section of the ordinance. We quote from the opinion as follows:

"KORNEGAY, J.

"This is a proceeding in error from the district court of Oklahoma County. Three district judges sat on the hearing, consisting of Judges Harve L. Melton, T. G. Chambers, and Lucius Babcock. The order complained of in the matter can be found at page 188 of the case made, and is as follows:

* * * * * *

"In this case, the city of Oklahoma City appears to be acting under a charter form of government. It was also a city when the Constitution of the State of Oklahoma was made. Its powers in these matters are largely affected by the provisions of the Constitution. By the Enabling Act, the laws in Oklahoma were extended over the state, until changed by the Constitution or other law making power of the state.

* * * * * *

"The ordinance in this case is lengthy, and the briefs have largely confined the discussion to certain phases of it. An examination of the cases cited under proposition 1 does not disclose that there is anything in them, that would warrant us in holding that the general police power of Oklahoma City to provide for the safety and health of its inhabitants, is in any way taken away by virtue of the jurisdiction conferred upon the corporation commission, to superintend the drilling for oil and gas, and their carrying and preservation.

"(3) Under proposition No. 2, the argument is that section 21 of Ordinance 3944 of Oklahoma City violates Section 1

of Article 14 of the Amendments to the Constitution of the United States, and Section 2 of Article 2 of the Constitution of the State of Oklahoma, and Section 7 of Article 2 of the Constitution of the State of Oklahoma, is therefore void.

* * * * * *

"The case of *Dobbins* v. *Los Angeles*, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169, is cited to the effect that the court has power to pass upon the reasonableness of the ordinance adopted by the city and the exercise of its power for the protection of its inhabitants. The case of *Lawton* v. *Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385, is cited, and a case from the Supreme Court of the State of Oklahoma, *Walcher* v. *First Presbyterian Church of Norman, Okla.*, 76 Okla. 9, 184 Pac. 106, 6 A. L. R. 1593, is cited with reference to unnecessary restrictions and the tendency of the ordinance to protect public health, morals, safety, or welfare. The case of *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, is cited, discussing the necessity of the legislative acts for inferior and municipal bodies being reasonable. Other cases cited are as follows: *Reagan* v. *Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014; *Hopkins* v. *Richmond*, 117 Va. 692, 86 S. E. 139, Anna Cas. 1917D, 1114; 19 R. C. L. par. 112, p. 305 and par. 113, p. 809; *City of Baltimore* v. *Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Walcher et al.* v. *First Presbyterian Church of Norman, supra; Holden* v. *Hardy*, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780; *Ex parte Throop*, 169, Cal. 93, 145 Pac. 1029; *Pennsylvania Coal Co.* v. *Mahon et al.*, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321; *Nectow* v. *City of Cambridge et al.*, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842; *Abbey Land & Improvement Co.* v. *San Mateo County*, 167 Cal. 434, 139 Pac. 1068, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804; *Continental Oil Co.* v. *City of Twin Falls, et al.*, 49 Idaho 89, 286 Pac. 353; *Youngstown* v. *Kahn*, 112 Ohio St. 654, 148 N. E. 842, 43 A. L. R. 662; *In re Gribben*, 5 Okla. 379, 47 Pac. 1074; *People* v. *Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, Ann. Cas. 1915A ,292; and the case of *Village of Terrace Park* v. *Errett et al.*, (C. C. A.) 12 F. (2d) 240. The case of *Re John Kelso*, 147 Cal. 609, 82 Pac. 241, 2 L. R.

A. (N. S.) 796, 109 Am. St. Rep. 178, and the case of *Pacific Palisades Association* v. *City of Huntington Beach*, 196 Cal. 211, 237 Pac. 538, 40 A. L. R. 782, are cited from California.

"Numerous extracts are taken from each of these cases, and it appears that there runs through them all the underlying principle embodied in the maxims, '*Sic utere tuo ut non laedas alienum*,' which, translated into modern phraseology, mean 'so use your own and not to hurt another.'

"The reply brief to the answer brief of defendants in error is largely a repetition of the matters set forth in the original brief, and cites similar authorities. Reference is made in the brief to the act of the Legislature of recent date allowing zoning and classification of areas and towns. We do not think that section of the statute was required in order to give to the governing power of the city of Oklahoma City the right to protect its own citizens from the encroachments of outsiders or encroachments of themselves.

"The constitution of Oklahoma provides in Section 10 of the Schedule for the continuation of the existence of municipal corporations such as Oklahoma City was. In the body of the Constitution, Section 2 of the Schedule provides as follows: 'Sec. 2. Oklahoma law in force. All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law. Section 3 (a) Art. 18, provides for special charters for city governments so long as their provisions are consistent with the laws of the state and subject to the Constitution. If additional power was necessary, it was in the power of the Legislature from time to time to confer it, as long as it is concerned with those matters of local self-government that from time immemorial have been conceded to belong to municipalities, which the general law making powers saw fit to confer. The case of *Ex parte Johnson*, 20 Okla. Cr. 66, 201 Pac. 533, dealt with a situation concerning the suppression of moving picture shows in the city of Bartles-

ville, and the opinion appears to sustain the syllabus, and the first three sections of the syllabus are as follows:

"'1. Within the limits prescribed by the Constitution and statute laws of this state, cities existing under a special charter form of government may have larger powers of self-government than are accorded to cities existing under general laws.

"'2. It is within the authority of the state, in the exercise of its police powers, to prohibit moving picture shows on Sunday; and such authority may be, by general law or by special charter, delegated to cities in the exercise of local self-government.

"'3. It is for the lawmaking body of a municipality or for the people themselves, in the exercise of the initiative and referendum, to determine, within the bounds of reason, the necessity or expediency of specific police regulations, subject only to the limitations prescribed by the Constitution and statutes of this state.'

"A decision (*Walton* v. *Donnelly*) dealing with the Oklahoma City Charter is found in the same volume (201 P.) at page 367 (83 Okla. 233), the first decision being by the Criminal Court of Appeals, the second one being by this court.

"With reference to those general provisions made by the Supreme authority for the protection of the lives and the health of the inhabitants of the municipality, there is a positive duty prescribed and a positive power conferred on the municipality; in fact, that is what it is organized for, as in a congested population there are so many matters calling for immediate action, and the situation changes so rapidly, that the Legislature, meeting every two years, could not effectually directly make the needed regulations. As applied to the present condition, it is conceded that the oil and gas wells in this case are within the corporate limits.

"The concern that we have here is whether or not the wells are within the limits of Oklahoma City, and whether or not they are of such a kind that their drilling should be regulated by the city commissioners.

"We must remember that Oklahoma is full of winds, and that the winds are variable. We also know that in this case there is evidence that the wells not far distant would produce as high as 86,000 barrels of oil a day. We also know that the gas pressure is enormous, and that the site of the well in this case is so near to the populous part of the city, that with a high wind and a break in the machinery, the well is liable to get out of control and scatter oil and gas over a large part of the city. As a property protection, the city was endowed with the power of regulation. But there is something far greater than property involved in this case; it is the safety of human life and health. On the other hand, there is at stake the chances of some men, joining with certain lot holders, who are trying to make a lot of money. We have on one side the people that want money and on the other side the people that want life, and its enjoyment in the home already provided.

"Complaint is made most bitterly that the requirement of a $200,000 bond is unreasonable and void. When one considers the amount that the oil well holder expects and the human lives that we know have recently been lost as a result of wild wells, the extra expense of furnishing some security for the benefit of the home owners is a very small factor. The cost of drilling the well is over $100,000, as we are informed. In the event wells within the corporate limits should become unmanageable, the stakes on the one side, as compared with the hope of profit on the other side, immediately throw the scales out of balance. If the well is a success, the full amount of the $200,000 bond would be the product of just a few days. If the well is a failure, the cost of the bond would not add more than 2 per cent to the cost of the experiment.

"It is further claimed that a personal bond is the only one that the small operator could possibly hope to get, and therefore it is an unjust discrimination. Viewed from the standpoint of the man who wants to make money, it might be. But this is not the case here. The case here is that some security for life and property of the people that built up the town is in the balance on the one side and profit is in the balance on the other side.

"We cannot see that the city ordinance, in requiring this $200,000 bond, is unreasonable, or unreasonable in requiring a surety, known to be solvent and subject to regulation by our laws. The three judges below thought the regulations reasonable. Nothing has been shown indicating the giving of this bond would in any manner interfere with the lawful rights of the plaintiff below. It may be their misfortune that they do do not get all they want, but the right of life and property, and to enjoy the gains of their own industry, is guaranteed to every person in the city of Oklahoma City, by the State Constitution. Considering its size and cost, and considering the probable profits, it is not unreasonable as compared to the property of others endangered. As compared to the hazard to human life, it is a bagatelle.

"The Supreme Court of the United States, time and again, reiterated the underlying principles. In the case of *New York & New England Railway Company* v. *Town of Bristol*, 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 272, there is an enunciation of this doctrine by Mr. Chief Justice Fuller, and in the body of the opinion, 151 U. S. 567, 14 S. Ct. 440, 38 L. Ed. at page 272, the court says: 'It is likewise thoroughly established in this court that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power to self-protection cannot be contracted away, nor can the exercise of rights granted nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.'

* * * * * *

"We are further of the opinion that the regulation requiring the bond was a reasonable one. Complaint is made of the lower court's not allowing a supersedeas, staying the effect of this temporary injunction granted the city. That question is now largely moot, and is not argued. Our statute does not al-

low a supersedeas as a matter of right in a case of that sort, it being within the the sound discretion of the court.

"We therefore affirm the action of the lower court in denying the injunction in favor of the plaintiff below, and granting a temporary writ in favor of defendants in error. There are other provisions in the ordinance not here involved. The cost will be borne by the plaintiffs in error."

We submit that the court in that opinion conclusively answered every contention made by the appellants in this appeal, and that the decision of the Oklahoma Supreme Court is conclusive of the question here.

It will be noted from the evidence in this case, and particularly the evidence of the appellants' witness, Chas. K. Scruggs, that the same requirements were made by the bonding companies of all drilling and operating companies with regard to qualification for bonds, and indeed it is not claimed by the appellants that any favoritism was shown or that there was an arbitrary action upon the part of the City, or any of its officials, affecting this bond requirement, and, as was said in *Reinman* v. *City of Little Rock*, 237 U. S. 171, 35 S. Ct. Rep. 511:

"* * * and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws within the meaning of the 14th Amendment."

We submit that there is no testimony tending to show that the

ordinance in question is unreasonable in any degree, but giving the testimony the benefit of every assumption that could possibly be drawn, it can go no further than to say that it raises a question that is debatable, which, of course, is not sufficient to invalidate an ordinance.

> "Fairly debatable question as to reasonableness, wisdom and propriety of legislative action are not for determination of courts."
>
> *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 49 S. Ct. 430.

The court saying:

> "Where legislative action is within scope of police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for determination of courts but for that of legislative body on which rests the duty and responsibility of decision."

The Standard Oil Co. case has been cited and approved in a number of later cases on this proposition. See the recent case of *Fuller Brush Co.* v. *Town of Green River*, 60 Fed. (2d) 613, and cases cited.

See, to the same effect, the case of *Marblehead Land Co.* v. *City of Los Angeles*, 47 Fed. (2d) 528, from which we quote as follows:

> "3-5. The legislative body intrusted with the police power has a wide discretion which cannot be interfered with by the court. Their laws or ordinances enacted in pursuance of the police power are invested with a strong presumption of validity. If the question as to whether or not the legislation is unreasonable or arbitrary or an unequal exercise of power is fairly de-

batable, the legislation must be upheld as valid. *Zahn* v. *Board of Public Works*, 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074, *supra*, and cases therein cited.

"6-17. The question for our consideration then is whether or not the reasonableness of the ordinance in question is fairly debatable. First, we will consider the matter with reference to the question of fire hazard. On the one hand it might be concluded that there was no substantial danger to adjoining property from the production of gas and oil upon appellants' land. This, however, depends upon the uncertain question as to the amount of gas and the pressure which would be developed therefrom by penetrating the oil or gas strata. It is a matter of common knowledge that in some cases oil wells, particularly in new territory, have gotten beyond control and resulted is disastrous fire. Such a well in the heart of a great city would be an intolerable nuisance, and it is conceded could be prohibited by the city council in the exercise of its police power. In an outlying and relatively unsettled district it is obvious that the fire hazard would be much less, if not entirely negligible. The city council presumptively acted upon the theory that such a hazard was real and substantial. The trial court, after hearing the evidence, held it to be a fact that the fire hazard was real and substantial. There is testimony to sustain this conclusion. The question then is whether this court, acting upon the evidence in the record to the contrary, and upon its general knowledge concerning production of oil, shall declare that the conclusions of the city council and of the trial judge are so arbitrary and unreasonable that they may be justly disregarded as determining the rights of the appellants. In this connection it should be observed that, in passing upon the conclusions of the trial court, or the local legislative body, the appellate court should give great weight to the determination of local authorities and the local courts especially familiar as they are with local conditions. *Welch* v. *Swasey*, 214 U. S. 91, 106, 29 S. Ct. 567, 53 L. Ed. 923; *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365, 30 S Ct. 301, 54 L. Ed. 515; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144, 34 S. Ct. 281, 58 L. Ed. 539.

"8. From the foregoing it would appear that the very least that could be said in favor of the validity of the ordinance is that the question of fire hazard resulting from mining operations is debatable, the diffusion of noxious and offensive gases into the surrounding dwellings is established by uncontradicted testimony, the utility of the appellants' land for residence purposes is thoroughly established and conceded, the trend of the residence district of the city toward and about the land in question is undeniable, and therefore the court is precluded from inquiring into the validity of an ordinance avowedly within the police power of the city, if not arbitrary, unreasonable, and unequal."

It has been held time without number that the court will not substitute its judgement for the judgment of the Legislature in matters of this character. See *Otis & Gassman* v. *Parker*, 187 U. S. 606, 23 S. Ct. Rep. 168, where the court said:

" * * * But general propositions do not carry us far. While the the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*

"Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of people concerned as to that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that

an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is clear unmistakable infringement of rights secured by the fundamental law.' *Booth* v. *Illinois*, 184 U. S. 425, 429, 46 L. Ed. 623, 626, 22 Sup. Ct. Rep. 425, 427. * * *"

See a good expression to the same effect from the Supreme Court of California in *Zahn* v. *Board of Public Works* (Calif.) 234 Pac. 388, at 395:

"In *Miller* v. *Board of Public Works*, *supra*, it was said: 'That courts are loathe to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. * * * Every intendment is to be indulged by the courts in favor of the validity of its exercise, and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts'."

It has been repeatedly held that the burden rests upon the appellants to overcome a statute or ordinance and that all doubts must be resolved in favor of its validity. See *Champlin Refining Co.* v. *Corporation Commission*, 51 Fed. (2d) 823, where it was said:

"(1, 2) We observe at the outset that the burden rests upon the plaintiff to establish that the statute infringes, the constitutional guaranties which it invokes, and if the statute is susceptible of a construction which conforms to constitutional requirement, doubts must be resolved in favor of and not against the state. *Toombs* v. *Citizens Bank of Waynesboro*, 281 U. S. 643,

647, 50 S. Ct. 434, 75 L. Ed. 1088; *United States Airways* v. *Shaw* (D. C.) 43 F. (2d) 148, 150."

This decision of the United States District Court for the Western District of Oklahoma was affirmed in this Court May 16, 1932. See *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 52 S. Ct. Rep. 559.

Police regulations often injure property rights but this is no argument against their enforcement, as has been shown by the cases heretofore cited and relied upon.

See also:

City of Youngstown v. *Kahn Bros. supra;*
Zahn v. *Board of Public Works*, (Cal.) *supra;*
Miller v. *Board of Public Works*, (Cal.) *supra;*
Marblehead Land Co. v. *City of Los Angeles. supra.*

The appellants would emphasize the fact that the location of this well had been used as the dump grounds of the City before the attempted development for oil, and for that reason any regulation as to drilling upon it would be unjustified. However, we call attention to the evidence which shows that this location was about one mile from the City Hall or business center of the City, and that while there were not many houses in the immediate vicinity of the well, that it was built up to the north and west with valuable wholesale and industrial buildings, and that two of the railroad passenger stations were between the location and the City Hall. The evidence further showed that the prevailing winds were from the south and east and that on account of the high pressure in this field wells

sprayed oil for distance of about two miles. It would be hard to imagine the amount of damage, should a well at this location get out of control and run wild, or get on fire. A whole city could be wiped out over night. Certainly the authorities of the City were justified in taking every precaution to regulate drilling within the city limits and to pass this bond provision, which, as we have seen from the authorities, does have a direct relation to the enforcement of precautionary measures and safety regulations.

The right to legislate with reference to regulating the oil industry and the drilling of wells cannot be questioned in view of the following listed authorities:

Herkness v. *Irion*, 11 Fed. (2d) 386;
Winkler v. *Anderson* (Kan.) 177 Pac. 521, 3 A. L. R. 268;
Oxford Oil Co. v. *Atlantic Oil & Producing Co.*, 16 Fed. (2d) 639; Affirmed in 22 Fed. (2d) 579;
Marrs v. *City of Oxford*, 24 Fed. (2d) 541; Affirmed in 32 Fed. (2d) 134;
Ohio Oil Co. v. *Indiana*, 20 S. Ct. Rep. 576, 177 U. S. 190;
C. C. Julian Oil & Royalties Co. v. *Capshaw*, 145 Okla. 237, 292 Pac. 841;
Champlin Refining Co. v. *Corporation Commission of Oklahoma*, 51 Fed. (2d) 823; Affirmed 52 S. Ct. Rep. 559; 286 U. S. 210;
Marblehead Land Co. v. *City of Los Angeles*, 36 Fed. (2d) 242; Affirmed in 47 Fed. (2d) 528;
Helmerich & Payne v. *Roxanna Petroleum Corp.* (Kans.) 14 Pac. (2d) 663.

The case of *Marrs* v. *City of Oxford*, cited above, is a very instructive case on the construction of an ordinance of the City of Ox-

ford after which the Oklahoma City ordinance was modeled in many respects. The Oxford ordinance is set out in 32 Fed. Reporter, at page 136, and it will be noted that the bond provisions, as shown by Section 7 thereof, are very similar to the bond provisions of the Oklahoma City ordinance with reference to the furnishing of bond signed by "a surety company authorized to do business in the State of Kansas". That provision of the ordinance was not particularly attacked in that case, but the general provisions of the ordinance in relation to its regulations of oil drilling were sustained. *The Helmerich & Payne* case, *supra*, is a recent decision from the Supreme Court of Kansas upholding the same ordinance.

We submit under the authority shown in the cases cited, that the judgment of the Supreme Court of the State of Oklahoma should be affirmed, and that the Court will be justified in saying of the ordinance in question, as was said by Mr. Justice Clark, in his opinion in the *Thomas Cusack Co.*, case, *supra*:

> "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this court, concluding with *Armour & Co. v. North Dakota*, 240 U. S. 510, 514, 60 L. Ed. 771, 775, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We therefore content ourselves with saying that, while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is ap-

proved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 3-, 49, L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 Anna. Cas. 765. And this, for the reasons stated, cannot be said of the ordinance which we have here."

Consequently, we submit the case in confidence, believing that the judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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City of Oklahoma City,
W. H. BROWN,

Attorneys for the Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 547.—October Term, 1932.

Walter H. Gant, Knox L. Garvin, and A. D. Hudspeth, Appellants,
vs.
The City of Oklahoma City and J. W. Van Meter, Superintendent of Buildings.

Appeal from the Supreme Court of the State of Oklahoma.

[April 10, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

The bill of complaint alleges that plaintiffs (appellants here) are lessees of a tract of land in Oklahoma City, State of Oklahoma, supposed to contain gas and oil; that by the terms of the lease they are required to commence drilling a well within a time fixed; that they have contracted for such drilling and the work has been begun and is now in progress; that they have a permit from the authorities of the city as required by ordinance, but defendants threaten to and will forcibly stop the work, to plaintiffs' irreparable damage, unless they execute and file a bond conditioned as provided by the city ordinance in the penal sum of $200,000, signed by some surety company authorized to transact business within the state; that the ordinance making such requirement is unreasonable and unconstitutional, and if enforced will have the effect of depriving plaintiffs of valuable property rights without due process of law. An answer was filed denying generally the allegations of the bill, and a cross-petition, praying that plaintiffs be restrained from continuing the drilling of the well until plaintiffs had executed the bond required by the ordinance. After a hearing, at which evidence was introduced in support of the bill, the trial court denied plaintiffs' prayer for an injunction and granted a permanent injunction against them upon the cross-petition.

The bill does not in terms charge an infringement of the Fourteenth Amendment or of any other provision of the federal Con-

stitution; and the record does not disclose whether the trial court at any time considered or determined that question. Nor is there anything in the present record to show, except inferentially, that the federal question was raised by appellants or considered by the supreme court. A basis for our jurisdiction must be found, if at all, in the decision and opinion of the state supreme court upon a prior appeal in the same case from a decree granting an interlocutory injunction. *Gant* v. *Oklahoma City,* 150 Okla. 86, 89. It there appears that an attack upon the ordinance as infringing the due process of law clause of the Fourteenth Amendment was argued before and considered by that court, and the ordinance sustained as valid under that clause as well as under the due process clause of the state constitution. An appeal to this court followed but was dismissed for the want of jurisdiction, the decree not being final. 284 U. S. 594. After the remand to the state court of first instance, final decree on the merits was rendered against appellants. From that decree an appeal was taken to the state supreme court, which affirmed on the authority of its prior decision. — Okla. —. In effect, the earlier decision was thereby read into, and made a part of, the later one. Appellants, by this appeal, therefore, have invoked the jurisdiction of this court at the first opportunity open to them, and the federal question, having been considered by the state supreme court, is properly here. *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 256-257; *Louisiana Nav. Co.* v. *Oyster Commission,* 226 U. S. 99, 101-102; *Chesapeake & Ohio Ry. Co.* v. *McCabe,* 213 U. S. 207, 214.

The ordinance, so far as pertinent, provides that no well shall be drilled within the limits of the city until there shall be filed with the city clerk a bond in the sum of $200,000 covering each well, executed by "some bonding or indemnity company authorized to do business in the State of Oklahoma," conditioned for the payment of damages on account of injuries to property, bodily injuries, etc., suffered by anyone and resulting from the drilling, operation or maintenance of any well or any structures, etc., appurtenant thereto.

In view of the peculiar dangers incident to the drilling and operation of an oil or gas well within the limits of a city and of the large interest involved if the well be successful, neither the requirement for a bond nor the amount fixed can be declared arbitrary or unreasonable. Indeed, the objection to the ordinance on

these grounds was but indifferently urged at the bar. The point stressed was that the provision of the ordinance requiring the bond to be given by a bonding or indemnity company authorized to do business in the state, and thereby excluding the furnishing of personal sureties, is so arbitrary and unreasonable as to constitute a denial of due process of law. That contention also is without merit. The most that can be said is that whether the guaranty of a bonding or indemnity company operating under state law and subject to state regulation, is of greater worth than that of personal sureties, is a question about which opinions reasonably may differ. But the question is one primarily addressed to the judgment of the law-making body, and that body having determined that the former is so far superior that the latter should be excluded from eligibility altogether, there is nothing in the due process of law clause of the Fourteenth Amendment which requires the courts to upset the conclusion. "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all." *Otis* v. *Parker*, 187 U. S. 606, 608-609.

Whether the judgment of the common council of the city in the present case was wise, or whether the requirement will produce hardship in particular instances, are matters with which this court has nothing to do. It is impossible for us to say that the provisions of the ordinance are clearly arbitrary and unreasonable. If there be room for fair debate, this court "will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Zahn* v. *Bd. of Public Works*, 274 U. S. 325, 328; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584.

There is evidence in the record tending to show that conditions were imposed by surety companies of an onerous character, with which appellants were unable to comply. But it also appears that other operators within the city limits were able to comply with all conditions imposed and had procured and filed bonds in accordance with the ordinance. So far as the record discloses, appellants stood alone in their inability to satisfy the requirements of

the bonding companies. The fact that appellants, for reasons peculiar to themselves, could not meet the imposed requirements does not militate against the constitutionality of the ordinance. *Packard* v. *Banton*, 264 U. S. 140, 145; *Standard Oil Co.* v. *Marysville*, *supra*, at p. 586; *Hodge Co.* v. *Cincinnati*, 123 Ohio St. 284, 296. An otherwise valid statute or ordinance conferring a privilege, is not rendered invalid merely because it chances that particular persons find it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.